Supreme Court, U.S.
FILED

091286 APR 20 2010

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No. 2010

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCIS OSEI-AFRIYIE,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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Pro-se Petitioner

QUESTIONS PRESENTED

1. Is an individual's Fourteenth Amendment right to the equal protection of the laws violated where the State is permitted to misapply the law?
2. Is a defendant's Sixth Amendment right to confront a witness against him or her violated where an untrained person is allowed to substitute for a trained and qualified Alcotest operator without an expressed waiver?

LIST OF PARTIES

Petitioner:

FRANCIS OSEI-AFRIYIE

Respond

STATE OF NEW JERSEY

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ORDERS AND OPINIONS BELOW

The Order of the Supreme Court of New Jersey is at Appendix A. The Opinion of the same Appellate Division is at Appendix B. The Order of the New Jersey Superior Court (Appellate Division) is at Appendix C. The Letter Opinion and Order of the New Jersey Superior Court (Law Division) is at Appendix D. The transcript from the de novo trial at the Law Division is at Appendix E. An excerpt from the July 16, 2008 municipal court hearing is at Appendices F. The municipal court transcripts from the September 11, 2007 hearing is at Appendix G.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257. The New Jersey Supreme Court entered an Order on January 26, 2010 denying petitioner's petition to certify the opinion of New Jersey Superior Court (Appellate Division). The Order was filed on January 28, 2010 and is final as to the questions presented in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the 14th Amendment states, in pertinent part that:

"*...No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*"

The Sixth Amendment states, in pertinent part that:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage , of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Implied Consent Law: 18 U.S.C. § 3118 provides:

"Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving under the influence of a drug or alcohol in such jurisdiction. The test or tests shall be administered upon the request of a police officer having reasonable grounds to believe arrested to have been driving a motor vehicle upon the maritime and territorial jurisdiction of the United States while under the influence of drugs or alcohol in violation of the laws of a State, territory, possession, or district."

The New Jersey "Implied Consent Law," N.J.S.A. (39:4-50.2) provides:

" Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of

samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood provided, however, that the taking of samples is made in accordance with the provisions of the act and at the request of a police officer who has reasonable grounds to believe that such a person has been operating a motor vehicle[while under the influence of an intoxicating liquor, narcotic, hallucinogenic, or habit-forming drug]. [N.J.S.A. 39:4-50.2(a)].

STATEMENT OF THE FACTS RELEVANT TO QUESTIONS PRESENTED

Petitioner(P) was arrested on May 28th, 2007 and charged with five counts including refusing to submit to a breath test, N.J.S.A. 39:4-50.2 and driving while intoxicated, N.J.S.A. 39:4-50. On September 11, 2007, P appeared with counsel at a hearing at the Carney's Point municipal court in New Jersey. Except the refusal charge, the prosecutor recommended the dismissal of all the other charges particularly due to P's medical problems. P pled guilty to the refusal charge because of what the municipal court told him refusal amounted to and the court accepted the guilty plea:

"THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. See, P's appendix (P.app.) 72.

Applicable fines and sentence were imposed but suspended pending the New Jersey Supreme Court's decision in State v. Chun. 94 N.J.158 (2008). The holding in that decision included:

"**Charging an arrestee with refusal remains largely within the officer's discretion.**" See, p.10.

After that decision, petitioner reappeared at the municipal court on July 16, 2008 with his attorney. This time, defense counsel made an application to withdraw P's guilty plea because: 1) the Alcotest operator opined with the arresting officer, who was aware of P's medical conditions at the time of the test, that P was unable to provide the required breath sample and 2) the operator abused his discretion in stopping the test after only two tests despite P's medical problems. The motion was denied and the judge re-imposed the sentence. At the hearing though, the State called the arresting officer instead of the Alcotest operator who administered the breath test to testify. His testimony included, in the main, how the Alcotest machine works (P.app.60,61).

Petitioner appealed pro se at the New Jersey Superior Court (Law Division), contending, among others, that (1) **his guilty plea was involuntary and unknowing because the trial court misinformed him about the New Jersey Implied Consent Law (P.app.35-36) and (2) that the rights he is guaranteed under the 6th and 14th amendments to the United States Constitution had been violated** (P.app.9,39,42). At the Law Division though, the judge acknowledged that the municipal judge had

misinformed P about the law, determined that that was an issue in the case and promised to "consider and address" it:

MR. AFRIYIE: But what the standard of review is...whether or not the judge applied the law correctly that is an interpretation of the law...and that is what I'm asking this Court to do.

THE COURT: Okay.

MR. AFRIYIE: So what I have said pinpoint the fact that he misinterpreted the law.

THE COURT: Okay. I understand that. You are correct. Pet.app.37

THE COURT: And, Mr. Afriyie raises the issue that his waiver of the trial was based on insufficient information, improper information, so forth. It is mind- - *I'm mindful of course that he had an attorney present who- - with whom he perhaps should have conferred on that... He had counsel with him, but I'm limited to the record below and I'll consider it again carefully of course*..... Pet.app.56

MR. AFRIYIE: ***What about the Judge's interpretation of the New Jersey Statute where it says that given (sic) insufficient breath will amount to refusal?***

THE COURT: ***This is an issue in the case...Whether you're giving an insufficient volume is tantamount to a refusal is an issue in the case, and that point you raised, and I'll address that...*"** P. app.57. Emphasis added.

That court failed to honor its promise to the parties. At the same time the court made the following finding:

"THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." P.app.55.

Nevertheless, P was found guilty and the fines and the sentence were re-imposed. P again filed an appeal with the New Jersey Superior Court (Appellate Division), essentially making the same arguments and additionally requesting the court to carefully review the Law Division's findings and unfulfilled promise (i.e.unfinished business) and make a determination. That court failed to honor the request but affirmed the Law Division's decision by concluding:

"We have fully considered the arguments raised on appeal. Having done so, we affirm defendant's conviction and sentence, substantially for the reasons expressed by Judge Forester's letter opinion of November 7, 2008." P.app.9, and "Defendant's remaining legal and constitutional arguments lack sufficient merit to warrant discussion." P.app.12

P then filed a motion for reconsideration. The motion was denied in part and granted in part.P.app.13. Finally, P filed a petition for certification with the Supreme Court of New Jersey raising the same constitutional and statutory questions for a review. The petition was denied on January 26, 2010 and filed at the Clerk's office on January 28, 2010. P.app.1. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO CORRECT SANCTIONING THE DENIAL OF EQUAL PROTECTION OF THE LAW BY THE NEW JERSEY SUPREME COURT

Petitioner appeared for a hearing on 9/11/2007 at the municipal court in Carneys Point. See, P.app.67-73. What happened at the hearing included:

THE COURT: And did they take you to Moorestown

Barracks and request that you take a breath test?

DEFENDANT: YES.

THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. I find it's voluntary and there is a factual basis. I'll stay the sentence pursuant to Chun. The sentence is a $306 fine, $33 costs, $100 DWI surcharge, 210 days revocation of the driving privileges, and twelve hours minimum mandatory attendance IDRC. The other charges are dismissed."

P was made aware that the other charges were dismissed because of medical problems and not due to any unsubstantiated and asserted negotiated plea agreement:

"THE COURT: So you're moving to dismiss the 4-50 and other charges?

MR. HATHAWAY: That's right. Yes. And - - and particularly in light of defendant's- -

...

MR. HATHAWAY: - - problems that are shown in the doctor's reports." P.app.71.

The New Jersey "Implied Consent Law," N.J.S.A. (39:4-50.2) provides:

" *Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood provided, however, that the taking of samples is made in accordance with the provisions of the act and at the request of a police officer who has reasonable grounds to believe that such a person has been operating a motor vehicle[while under the influence of an intoxicating liquor, narcotic, hallucinogenic, or habit- forming drug]." [N.J.S.A.39:4-50.2(a)].*

Under the above statutory scheme, a defendant who does not provide enough breath sample to register a proper reading is not automatically guilty of violating N.J.S.A. 39:4-50.2. That needs to be proven in a trial. To secure a conviction under the statute, the State must prove all the elements of the violation, including " that defendant refused to submit to a breathalyzer test." State v. Wright, 107 N.J. 488, 490 (1987). The burden is on the State to prove refusal to take a breathalyzer test beyond a reasonable doubt; and if all the elements of the violation are not established, no conviction shall issue. State v. Cummings, 184 N.J. 84, 95 (2005), 875 A. 2d 906.

More specifically, implied consent statutes provide that any person who is arrested for driving while under the influence of alcohol has an affirmative obligation to submit to a breathalyzer test. The statutes' purpose is to encourage motorists suspected of driving under the influence to submit to breathalyzer tests. State v. Wright, ibid. A defendant is required by law to give "a valid sample." This is defined as two samples, **and not two tests**, that differ no more than 0.02. A greater difference requires repetition until a valid sample is collected. But as reflected in Special Master, Judge King's Report, Findings of Fact and Conclusions of Law Submitted to the New Jersey Supreme Court: February 13, 2007, that Remand Court held:

> In instances where a defendant is tested on an Alcotest 7110 and there is no reportable breath test value on the AIR for that defendant, the AIR must clearly show the source and the reason why no breath test result was reported for that sample. This non-reportable test event in itself shall not constitute a legal determination of refusal to submit to chemical breath testing under the implied consent statutes. p. 233, item (e).

Further, according to Sgt. Kevin M. Flanagan's expert testimony before Judge King in Chun, the Alcotest 7110 allows the operator eleven attempts at collecting ***two valid breath samples***.

> "After the eleventh attempt, the instrument gives only two options: (1) terminate; and (2) refused. At that point, the operator does not necessarily have to charge refusal. For example, if a subject has made several unsuccessful attempts, **the operator can choose to terminate the test and give an opinion that the subject was not capable of providing a proper sample.**" Ibid., at 114-15.

Alcotest Program and he had trained 5,000 operators by 2007.

In recognition of these facts, the New Jersey Supreme Court in Chun, id., stated:

> The minimum breath volume is significant, in and of itself, because the Alcotest is programmed to determine whether the four minimum criteria have been met in a precise order, the first of which is volume analysis. A sample that falls short of the currently required 1.5 volume measurement will be found to be unacceptable. In that event, the Alcotest will report the amount of air delivered and will display an error message which reads: "minimum volume not achieved." The Alcotest permits up to eleven attempts to collect two samples, after which, the only options that the device offers are "terminate" or "refusal." If the operator chooses terminate, the Alcotest will reset and the subject can then be given the opportunity for eleven more attempts. If the operator chooses "refusal," the test sequence ends, but the operator is not required to issue a summons for refusal. N.J.S.A. 39:4-50.4a. **Charging an arrestee with refusal remains largely within the officer's discretion**." (quoting State v. Widmaier, 157 N.J. 475, 724 A.2d 241 (1999). Hence, N.J.S.A. 39:4-50.2 is not a per se violation.

The New Jersey Superior Court (Law Division) totally agreed with the retired Michael King, J.A.D. as indicated above, P.app.37,56,57 or p.5 of brief, but failed to honor its own promise made to the parties, Pet.app.15-23. P had asked the appellate court to review the unfulfilled promise but it failed to do so, Pet.app. 2-12.

The courts below conveniently ignored the critical issue and indeed did not give it any consideration. P believes that when a defendant requests that the appellate court review

The courts below conveniently ignored the critical issue and indeed did not give it any consideration. P believes that when a defendant requests that the appellate court review an unfulfilled promise made by the Law Division, that court must examine the record if the evidence presents a rational basis for such a request and make a determination or act upon it. Where no such request has been made by a defendant, the court must determine independently whether the evidence "clearly indicates" it is appropriate to do that especially when it is about a question of law even if at odds with the strategic considerations of counsel. **Therefore, in view of the fact that the appellate court ignored P's request to review the Law Division's postponed but unfulfilled promise "to consider and address" the trial court's interpretation of the New Jersey Implied Consent Law raised above, there is no question that the review process undertaken by the appellate court was applied differentially or in a discriminatory manner.** That court simply "rubber-stamped" the Law Division's unfinished or delayed business by acceding to the contents of its letter opinion. It concluded:

"... we affirm defendant's conviction and sentence, substantially for the reasons expressed in Judge Forester's letter opinion of November 7, 2008" but shockingly and inexplicably it ignored what Judge Forester acknowledged and promised, pp.6-7.

In the American judicial system, the function of the reviewing court is to determine whether adequate, substantial, credible evidence exists on the record to support findings of fact and to correct any errors of law. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App.Div. 2005); Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Questions of law are reviewed de novo. McDonalds v. Fountain, 2007 WL 3262211 (Del. Super. 2007) *1. And the reviewing court owes no particular deference to the legal conclusion of the trial court or Law Div., Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan ,

140 N.J. 366, 378 (1995). In order words, the law is the law and it is reviewed for proper interpretation and application. This too was not done here and the conviction required a reversal.

The implied consent law, as stated above, does not mandate that not providing adequate breath sample to register a proper reading is tantamount to a violation and is thus not a per se violation. In no published case decided by this Court, by the New Jersey Supreme Court, by the trial level courts, nor by any court in the United States for that matter has it been held that not producing enough sample of breath to register a proper reading constitutes a legal determination to refusal. Petitioner was, therefore, denied his right to the equal protection of the laws guaranteed to all citizens.

> "[W]here an important personal right is affected by governmental action, *the New Jersey Supreme Court*) often requires the public authority to demonstrate a greater "public need" than is traditionally required in construing the federal Constitution. Specifically, it must be shown that there is an "appropriate governmental interest suitably furthered by the differential treatment." Chun, Ibid.

This was not shown here but the Equal Protection Clause of the United States Constitution mandates that no state shall" deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d. 313, 320 (1985).

By denying the P's petition for certification despite its own holding (**Charging an arrestee with refusal remains largely within the officer's discretion**", (p.10), and despite the holding by its remand court, (p. 9), the New Jersey highest Court effectively sanctioned the conclusion that any defendant who could not give adequate breath

volume is automatically guilty of violating N.J.S.A. 39:4-50.2. In order words, the Court equated the refusal statute with the per se violation of N.J.S.A. 39:4-50(a) at a "blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood" as had been established by the New Jersey Legislature. However, since the Legislature had included the per se violation in its DWI statute, N.J.S.A. 39:4-50(a), it can be reasonably concluded that the same Legislature consciously and intentionally excluded it in the refusal statute Regardless of one's views as to the wisdom of the statute, the role of a judge is limited to applying the statute objectively and not revising it. "A court may not engraft upon a statute language which has been clearly excluded therefrom." In re Adoption of Swanson, 623 A. 2d 1095, 1097 (Del. 1993). . The Latin rule of statutory construction states, "Expressio unis est exclusion alterius" ("The expression of one thing is the exclusion of another"). Where the Legislature excluded " a non- non-reportable test event as a per se violation to submit to chemical breath testing under the implied consent statute, it is reasonable to conclude that the Legislature was aware of the omission and intended it. This intended omission "is the best evidence of a legislative policy" against implying that a non-reportable test event amounts to a legal determination of refusal to submit to chemical breath testing under the implied consent statutes enacted throughout the United States. Id. at 1097; see , Guiricich v. Emtrol Corp., 449 A. 2d 232, 238 (Del. 1982). ("The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature."); see also, American Fed'n of State, County & Mun. Employees v. State, 293 A.2d 567, 570 (Del. 1972) (If it was the intent of the legislature to include a provision in a statute, "the Legislature could have and, in our opinion, would have, simply specified" the provisions). **Therefore, any change in N.J.S.A. 39:4-50.2, either addition or deletion would**

require a statutory amendment which has not been made.

In 1989, Supreme Court Justice Brennan, in writing the minority dissent on the DeShaney case, spoke well to the gravity of injustice that would be perpetrated by that decision. "My disagreement with the Court," Justice Brennan wrote, "arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it." DeShaney v. Winnebago County, 489 U.S. 189 (1989). Therefore, no human right can be secure when the protection of that right is left to the arbitrary whims and discretion of those in power.

The text and history of the "equal protection of the laws" embodied in the Fourteenth Amendment manifested both a promise and a command. As a promise, it was to extend to all persons; as a command, it forbade denials of equal protection, imposing an obligation on the states to refrain from invidious discrimination and to ensure that state laws were administered with actual equality, rather than the sham represented here by adding to the law and ignoring a request to review an unfulfilled promise by a court.. Finally, it is noted that history indicates that to secure this promise and to enforce this command, Congress was necessarily vested with the affirmative power to enact comprehensive legislation preventing or remedying state denials of equal protection.

Section 1 of the Fourteenth Amendment commands that no state shall "deny equal protection of the law," and "when equal protection is withheld, when it is not afforded, it is denied." Cong. Globe, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt). As a necessary consequence, the clause gave rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." A state denies equal protection where it fails to

give it. Denying includes inaction as well as action. Id. at 501 (statement of Sen. Frelinghuysen).

How can one object to the result reached by the appellate court in this case? One only needs to look at (1) the decisions by other courts in the U.S, (2) the February 13, 2007 holding by Judge Michael King at the Remand Court in Chun, pp.13-14, (3) Judge Forester's acknowledgement of the trial court's misinformation provided to P to get a guilty plea, pp.6-7, and (4) his finding that it was doubtful whether P refused to take the test given his medical problems:

"THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." P. app.6,55.

Under no set of circumstances can any driver replace, relive or retrieve the months of the right to drive that are forever lost and continue to be lost. The loss of driving privileges cannot be replaced, and such loss is inapposite to property deprivation which property can be replaced, in same or like kind. A citizen's loss of his or her fundamental liberty right to drive without due process causes irreparable harm.

In South Dakota v. Dole, 483 U.S. 203 (1987), United States Supreme Court considered federalism and the power of the United States Congress under the Taxing and Spending Clause. The Court, in a 7-2 decision authored by Chief Justice William Rehnquist, concluded that Congress has power under the Taxing and Spending Clause to impose conditions in its spending. But, Congress's conditional spending is subject to four restrictions:

1. The condition must promote "general welfare;"
2. The condition must be unambiguous;
3. The condition should relate "to the federal interest in particular national projects or programs;" and

4. Congressional condition of highway funds is merely a "pressure" on the state to comply, not a "compulsion" for Congress to avoid running afoul of the Tenth or Twenty-First Amendment.

Under the above Clause, the federal government currently funds grants to states that implement certain DUI prevention programs. As a direct result, many states including New Jersey, have implemented implied consent laws in their DWI statutes for both failure of a chemical test and refusal to take a test. States that do not comply with the law will lose a portion of their federal highway funds. Hence, withholding federal highway funds encourages states to adopt federal laws. If a state does not want federal highway money, then they can let arrested drunk drivers go without taking the breathalyzer test.

Receiving federal funds and implementing federal DWI programs would clothe such states with federal action. Consequently, discrimination by them and other conduct would be subjected to constitutional constraints because the federal government was involved either through coercion or encouragement. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

In the instant case, the respondent receives federal highway funds and has implemented programs as a result. See 18 U.S.C. § 3118 and N.J.S.A 39:4-50.2. 18 U.S.C. § 3118 does not provide that a defendant who does not provide the required breath volume to activate a breathalyzer machine is automatically in violation of the law without any evidence. Neither does N.J.S.A 39:4-50.2 as previously analyzed. Under the circumstance then, petitioner's right under the Fourteenth Amendment of equal protection of the laws was violated.

Next, the State and the Appellate Division rely on State v. Geller, 348 N.J. Super.359, (Law Div. 2001) to support the proposition that P's subsequent actions after he had agreed to take the breadthalyzer test constituted a refusal.

As P argued in New Jersey courts, this was irrelevant as to whether the trial court properly construed the law in order to get a guilty plea. He responded nevertheless. That reliance is misplaced because there were distinguishing factors. In the Geller case, although the defendant agreed to take Breathalyzer test, he had no medical problems, was defiant and overly hostile. He also purposely did not blow sufficient air into the mouthpiece during the first five tests even after he had received warning instructions from the officer and been cautioned. The municipal judge concluded that the defendant was "out of control" and "confrontational" and that "his anger and agitation clouded his overall judgement and conduct ...in taking these tests." Finally, he said, "I believe that he intentionally was giving improper samples. I think he was doing it to, frankly, aggravate the Lieutenant. He was...playing games..." and concluded that defendant's conduct constituted a refusal. Viewed in the context of the entire episode, the Superior Court also concluded that defendant's failure to give a sufficient breath sample despite five attempts was part of his pattern of belligerence rather than a result of inadvertence, misunderstanding, accident or physical inability." and affirmed. This case does not help respondent.

Interestingly, none of the conduct attributed to Mr. Geller was exhibited by P. On the contrary, P had medical problems (esophagitis for which he had received two operations, throat/laryngeal pain, throat irritation and cough) that affected his ability to perform deep exhalation. He was and still is a stroke victim. Indeed, at the Law Division hearing, the court doubted the refusal:

THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." p. 15 of brief and P.app. 6, 55.

The State did not give a rebuttal on the medical reports. But reasonable doubt comes from evidence and from lack of evidence.

P cooperated fully to give breath samples. Nowhere in his written reports did the trooper state on the day of the test that P was uncooperative in giving breath samples. . The operator never expressed the perception that P "was purposely refusing to blow sufficient air into the device". On the contrary, after the second failed attempt, he ceased the testing process and concurred with the arresting trooper that P was **unable** to provide valid samples. See P.s Appendix F.

Q. You indicated in your report – I believe you prepared the report that Mr. Shusted put into evidence that you determined that the defendant was unable to give a breath sample to the trooper. You included that in your report, correct?

A. Yes

Q. What - - allowed you to make that determination? What did you base that determination upon?

A. That was based on my- - sergeant at the time gave the Alcotest. He gave two samples that didn't meet the liters required to equal a positive test. The machine automatically shuts you off.

Q. All right. And in your report here, you don't have any notations saying that Mr. - - the defendant here was faking in regards to trying to give the sample?

A. In my report, no.

Q. All right. And it's also fair to say that your report, which we admitted into evidence as D-6, when you make the

discretionary call for the refusal, your very words say he is unable to do so.

A. Correct.

The plain meaning of the word "unable" in Merrian Webster's Collegiate Dictionary, 10th edition, means incapable and that of refusal means denying. Since the operator concurred with the trooper at the time he gave the tests that P was unable to give the required breath, he contradicted himself by punching refusal on the Alcohol Influence Report that P refused the test. The two are inconsistent (i.e. incapability versus refusal).

II. REVIEW IS WARRANTED TO CORRECT SANCTIONING THE VIOLATING OF PETITIONER'S CONSTITUTIONAL RIGHTS BY ALLOWING THE STATE OF NEW JERSEY TO SUBSTITUTE ANOTHER PERSON AS WITNESS INSTEAD OF THE ACTUAL ALCOTEST OPERATOR

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 106 S.Ct. 2142, 90 L.Ed. 2d. 636 (1986), quoting California v. Trombetta, , 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). **This "meaningful opportunity" is guaranteed to occur <u>not only</u> in a trial involving rights of confrontation but rather in all criminal prosecutions.**

Petitioner did not waive this right

The New Jersey Supreme Court has established its own Guidelines with respect to negotiated pleas (i.e. plea bargains) in the Municipal Courts. Plea bargains in the Municipal Courts are governed initially by *R.* 7:6-2(d), but supplemented by "Guidelines for Operation of Plea Agreements" in an Appendix to Part V II of the Rules Governing the Courts of the State of New Jersey. (See Office of the Attorney General of the State of New Jersey, Attorney General Guideline: Prosecution of DWI & REFUSAL violations, January 24, 2005.

The Municipal Court Guidelines, however, contain certain limitations with respect to the disposition of DWI and DWI refusal offenses. The relevant provisions of the Limitations, as set by the Supreme Court are as follows:

Guideline 4. Limitation

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses.

A. Driving while under the influence of liquor or drugs (*N.J.S.A.* 39:4-50)

If a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and **the defendant pleads guilty to the (N.J.S.A. 39:4-50) offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge.**

Nothing contained in the above sentence allows the judge to accept a plea agreement to dismiss a DWI charge. As the language of Guideline 4 makes clear, the Court

specifically permits the dismissal of the refusal charge where the defendant is also charged in connection with DWI offense arising from the same incident, and not vice versa. Therefore, dismissing the DWI charge would have run afoul of the Supreme Court's guidelines. It is noted that although the general ban on plea bargaining was lifted in 1988, the Supreme Court preserved the ban on plea bargaining drunk-driving cases. " State v. Hessen 145 N.J. 441, 448-49 (1966). The Court did so because of the strong public policy supporting strict enforcement of drunk-driving laws. The committee that generally endorsed plea bargaining excluded drunk-driving in view of "the extraordinary emotional and fiscal costs of drunk driving and 'the public's concern that the process of plea bargaining, as applied to alcohol and drug offenses, might undermine the deterrent thrust of New Jersey's tough law in these areas.'" Id. at 449 (quoting Supreme Court Committee to Implement Plea Agreements in Municipal Courts, Final Report at 28). **Hence, this case deserves a review by this Court because it involves a significant public policy.**

Additionally, according to the New Jersey Supreme Court Plea Agreement Guidelines as adopted 7-28-2004, effective 9-1-2004, in any situation where a prosecutor in a Municipal Court proceeding intends to engage in plea bargaining, subject to the Limitations imposed by the Supreme Court, the prosecutor must consider other obligations associated with plea negotiations. First, and foremost, the prosecutor **MUST PLACE ON THE RECORD** the terms and conditions of any plea agreement. Second, the prosecutor must adhere to the requirements of R. 7:6-2(d) (3) that the complaining witness (police or law enforcement officer, or private citizen) and the victim are present in court, and have been "consulted about the agreement."

Here, since there was no agreement, there was nothing on the record about the terms and conditions of any

"purported plea agreement" and the complaining witness (the police officer) was not in court on 9/11/07. It is, therefore, reasonable to conclude that he may not have been consulted about a non-existent agreement. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial and credible evidence. See, e.g., Pascale v. Pascale, 113 N.J. 20, 33, (1988) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). However when, as here, there is nothing in the record to support the conclusions of the lower courts, the resulting Order based on "negotiated plea" P.app.11) cannot stand and should not be allowed to hold. The lower courts adopted respondent's unsubstantiated position of "negotiated plea agreement" despite petitioner's position to the contrary. Indeed, due to the fact that (1) the trial judge misinformed P about the law and (2) P had no knowledge of a plea agreement, never signed any agreement and was not informed about any agreement, he contested every fact relating to the issue of pleading guilty **voluntarily** on appeal, brief, p.4. The other charges were dismissed because of P's medical problems. P.app.11-12. Petitioner, therefore, never waived his right to confront his witnesses.

The doctor's medical reports that Mr. Hathaway, the prosecutor, mentioned included a report from Dr. Robert Varipapa. In his report he stated:

> " Please be informed that this patient has a history of cerebravascular disease. Specifically, the patient had a right inferior cerebellar cerebrovascular accident in 1998 which was documented with MRI studies. His last MRI scan was in 2004 which showed multiple areas of increased signal, including involvement of the right cerebellum, compatible with cerebrovascular disease. Considering the patient's history of cerebrovascular disease, he would be precluded from the typical testing used for driving while under intoxication, such as tandem walking and other coordinating acts..."

Two other doctors also summarized their opinions as stated at P.app.6. These medical opinions ares consistent with Chun. Therein, the court stated that deep lung air is needed to get most accurate analysis, otherwise the machine would reject the sample because it would not achieve a plateau. That Court concluded:
'Therefore, we can be certain that all test subjects, regardless of age and gender, will only achieve *valid* sample when the deeper lung air is included. Chun, pp.57-61.

CONSTITUTIONAL RIGHTS VIOLATED

P had argued at the Law Division (Pet. App.32), at the appellate Division ((Pet. App.32) and again in his petition to the Supreme Court that any prosecution based on evidence submitted by a witness whom defendants are not permitted to cross examine and understand is a violation of due process under the Fourteenth Amendment of the United States Constitution and Article 1, paragraph10, of the New Jersey Constitution. Also, he had argued that the substitution of the arresting trooper for the Alcotest operator violated his Sixth Amendment right to confront a witness against him since the Supreme Court in Chun had ordered that:
"...in all pending prosecutions based on or including Alcotest New Jersey Firmware version 3.11 and all future versions, and consistent with past practices in prosecutions based on breathalyzer analysis,
The operator who conducted the tests shall be made available to testify and shall produce the documents evidencing his or her training..." and further said "... In matters relating to the Alcotest, the same general considerations that gave rise to the requirements must, of course, apply. Chun, Id. at 81.

The Law Division responded this way in its opinion letter:

The Law Division responded this way in its opinion letter:

" The test operator did not testify, nor did he provide his qualifications. Instead, the arresting officer who witnessed the operation of the Alcotest testified. D did not get the opportunity to cross- examine the operator. Furthermore, the three core foundational documents were not entered into evidence. However, D has only raised these issues on appeal. They were not discussed in the Municipal Court. Therefore, remanding the case for further fact finding would be improper." P.app.23.

The Appellate Division also said this in its opinion:

"With respect to the so-called 'foundational documents' identified in Chun, supra, at 134-45, and the State's non-production of the Alcotest operator at the plea withdrawal hearing, we sustain the denial of relief to defendant for several reasons. First, defendant did not raise this argument in municipal court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973). Second, the post-Chun proceeding in the municipal court was not a trial involving rights of confrontation but rather a post-sentencing hearing on an application to withdraw a guilty plea." P.app.12.

The New Jersey Supreme Court also denied P's petition for certification. By denying the certification, the New Jersey Supreme Court may well have violated the petitioner's right. This constitutional claim calls into question the accuracy of determining P's guilt or innocence upon the scrutiny of the alcotest operator's testimony. Without such information, no Court could determine whether or not P was a victim of miscarriage of justice in this aspect of the case.

By denying the petition for certification, the New Jersey Supreme Court also failed to require compliance of its own order in Chun.

Again, as P argued in his appellate brief and in his petition the New Jersey Supreme Court, the trial court's misapplication of the law would affect any driver (millions to say the least) who would be arrested on New Jersey roads and charged under N.J. 39:4-50.2 and who would be unable to provide a valid breath sample to register a proper reading irrespective of the cause. As such, this case is a matter of substantial public interest and an appellate court will consider it even if it was not raised below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). This Court should, therefore, review this case.

In a concurring statement in Murray v. Carrier, 477 U.S. 478, 498-99, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986),. Justice Stevens, stated:

"By denying these motions, the trial court significantly curtailed the defendant's ability to cross-examine the prosecution's most important witness, and may well have violated the defendant's right to review 'evidence favorable to an accused upon request--- where, the evidence is material either to guilt or to punishment.'" Id., quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d. 215 (1963). ... "That right is unquestionably protected by the Due Process Clause." Id. "Indeed, the Court has repeatedly emphasized the fundamental importance of that federal right." Id. "[T]he requirement of due process [is] to ensure that a miscarriage of justice does not occur."Id.

"The principle...is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Id. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id.

Justice Stevens continued:

"The constitutional claim advanced by respondent calls into question the accuracy of the determination of his guilt. On the record before us, however, we cannot determine whether or not he the victim of a miscarriage of justice. Respondent argues that the trial court's analysis was severely flawed ... Even if the trial judge applied the correct standard , the conclusion that there was no "exculpatory: material in the victim's statements does not foreclose the possibility that inconsistencies between the statements and the direct testimony would have enabled an effective cross-examination to demonstrate that respondent is actually innocent.... On the other hand, it is possible that other evidence in the record is so overwhelming that the trial judge's decision was clearly not prejudicial to the defendant. The important thing is that we cannot evaluate the possibility that respondent may be the victim of a fundamental miscarriage of justice without any knowledge about the contents of the victim's statements. Murray v. Carrier, 373 U.S. at 499.

In the instant case, the trial court not only misinformed P on the law, but also permitted trooper Cresong to be substituted for the operator as a witness. **He testified that it was the Alcotest operator who used his discretion to** (1) stop the Alcotest machine after the second test, (2) indicate on the AIR that P had refused to take the test and (3) inform him that **P was unable** to give the required volume of breath. Again, he testified that he (1) subsequently issued a refusal ticket based upon what the operator had stated on the AIR; (2) determined that, based upon the operator, the defendant was unable to give a breath sample to the trooper; (3) could not determine on his own whether P was unable to give or was refusing to give valid breath sample. "I can't make that determination." Despite this testimony, the trooper had previously prepared a report on what occurred at the test station on the day of the event as indicated below:

At the Station or Other Location:

"The defendant was read the DMV Standard Statement and asked if he would submit to a breath test at which time he stated "Yes". Sgt. E. Smith #4924 then attempted to administer two breath tests to the defendant utilizing the Alcotest. The defendant was given ample opportunities to provide a sufficient breath sample but was unable to do so. The defendant again was read his rights as per Miranda prior to being asked the questions on the Drinking Driver/ Operator questionnaire in which he answered."

Nowhere in the written report did the trooper state on the day of the test that P was uncooperative in giving breath samples or P did not try to give valid breath samples. Indeed, on the test date, the trooper explicitly stated that, D was unable to give a valid breath sample after "concurring with Sgt. Smith", the Alcotest operator.

Here, for instance, the trooper testified that the machine shuts off automatically if an arrestee provides two invalid samples, yet he also testified that it was the operator who stopped the box after P provided two invalid samples. Did the machine need the operator's help to shut off? This testimony was incorrect and the incorrect statement is not found anywhere in the Alcotest training manual. The trooper also testified that "very little needs to be given into that machine as far as to- - fill a liter up- - the - - the Alcotest up with air" and, therefore, petitioner was not trying to give valid samples. This statement too is not found in the training manual and **was the trooper's own conclusion**. P had advanced this argument on appeal.

These misleading and inconsistent statements pertain to the credibility of the witness. Certainly, if the State bears

the burden of proof and the defendant is presumed innocent until the substantive charge is proven beyond a reasonable doubt, a test of credibility is necessary. Fundamental rights of all citizens must be scrupulously protected in all courts. Consequently, critical analysis of the witness' interests, motive, and demeanor is important and examination of the objective reasonableness of the testimony is also highly probative. In addition, the fact-finder must not only make the necessary observations of all the elements required for an assessment of credibility but also must articulate those findings in detail in the record. State v. Locurto, 57 N.J. 463, (1999). (quoting Curtis v. Finneran, 83 N.J. 563, 569 (1980) (finding in a non-jury civil action, trial court's role of finding facts and stating conclusions of law is not satisfied with naked conclusions); See also State v. Sisti, 209 N.J. Super. 148, 151 (App.Div. 1986) (stating that Municipal Court's failure to make findings as to credibility of witnesses and as to proofs of guilt without breathalyzer is unfair to both parties). It is noted that the lower courts made no credibility findings. However, an impartial view of the officer's testimony and inconsistent written statements results in the determination that it lacks sufficient reliability to be accepted as a basis for satisfying the requirement that the State prove the charge beyond reasonable doubt. To preserve the constitutional rights of individuals and the integrity of our judicial system, our courts should not appear as if they are rubber stamping testimony of law enforcement officers as a basis for convictions. No less than meaningful review of the testimony offered by the police is required. Here, there was no overwhelming evidence of P's guilt. Evidence that suggested P's guilt was based largely on the testimony of a witness who provided conflicting written and oral statements about what occurred over a year apart. On the basis of these facts, P argued that the operator had "potentially relevant testimony" (Chun, p.118) that required his presence in the courtroom in order to explain any

inconsistency and that it was prejudicial to substitute the trooper for the operator.

In our jurisprudence, a defendant's day in court carries with it the right to an independent judicial evaluation of the testimony of all witnesses, which was woefully lacking. The required scrutiny was absent not only in the Municipal Court proceedings, but also in the trial de novo at the Law Division and on appeal to the appellate court. State of New Jersey v. Locurto, 304 N.J. Super. 514.

A defendant in a DWI prosecution is entitled to vigorously cross-examine all aspects of the breath machine. See, California v. Trombetta, 467 U.S. 479, 490, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). [A]s to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxiolyzer test, **not a substitute**, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered. Id. Lastly, under the Due Process Clause, "criminal prosecutions must comport with prevailing notions of fundamental fairness." Id. 485. The U.S. Supreme Court has "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity t o present a complete defense." Id.

Would not everyone surmise that the rationale behind the decision to ignore the petitioner's repeated requests was that the petitioner was merely an ordinary person or unrepresented foreign immigrant (call him David) defending himself against allegations of wrongdoing brought by the State (call the State Goliath)? Certainly, the courts are required to interpret the law correctly and not to provide any misinformation to induce a guilty plea. And, the Law Division's failure to honor its promise to "consider and address" the Municipal court's interpretation of the informed consent law, **despite such notice** and despite having agreed in open court that that court misinterpreted the law, had the practical effect of concealing from the

parties the principal issue that should have been decided at the de novo trial. The courts were also required to ensure that the State bore the burden of proving its case beyond a reasonable doubt in order to obtain a conviction in the instant case. These requirements were also ignored.

CONCLUSION

Respect for the role and importance of all New Jersey courts, including its Supreme Court, and for this Court's obligation to review the adherence of those courts to the legal principles governing the United States jurisprudence, not some disagreement with findings, is what leads this court to remand or to reverse when the guiding principles are permitted not to be followed. In the instant case, the supreme court of New Jersey sanctioned the petitioner's conviction and sentence which was not a product of conscientious application of the controlling legal principles. There was deviation from the legal principles that is sufficiently apparent to provide a principled basis to conclude that petitioner's conviction is shocking to the judicial conscience. The Order is repugnant to the United States Constitution, and will affect thousands of drivers who would be similarly situated, and is worthy of review by this Court. Petitioner respectfully petitions for Writ of Certiorari to the Supreme Court of New Jersey in State v. Francis Osei-Afriyie, C-566 (September Term 2009) 064920. [1]

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[1] Word count is 8,397.

Dated: 4/20/2010

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SUPREME COURT OF NEW JERSEY
C-566 September Term 2009
064920

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,

V.

FRANCIS OSEI-AFRIYIE,
DEFENDANT-PETITIONER.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-002210-08 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

Witness, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of January, 2010.

CLERK OF THE SUPREME COURT

The foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY

FILED
JAN 28 2010
CLERK

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2210-08T4

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,
V.

FRANCIS OSEI-AFRIYIE,
DEFENDANT-PETITIONER.

Submitted August 25, 2009 – Decided September 1, 2009

Before Judges Sabatino and Chambers.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Municipal Appeal No. 11-08.

Francis Osei-Afriyie, appellant pro-se.

John T. Lenahan, Salem County Prosecutor, Attorney for respondent (Thomas A. Desimone, Assistant Prosecutor, on the Brief).

PER CURIAM

Defendant Francis Osei-Afriyie, pro se, appeals the Law Division's order dated November 17, 2008. The in question sustained the municipal court's rejection of defendant's application to withdraw his plea of guilty of

refusing to submit to a breath test, N.J.S.A. 39:4-50.2, and to vacate his associated conviction and sentence for the offense. We affirm.

The pertinent chronology is as follows. On the evening of May 28, 2007, defendant was involved in a motor vehicle accident on the New Jersey side of the Delaware Memorial Bridge. Perceiving that defendant might have been driving under the influence of alcohol, a State trooper administered field tests. When defendant failed to perform the field tests to the trooper's satisfaction, defendant was placed under arrest and brought to the State Police barracks in Moorestown.

Once at the barracks, defendant was administered a breath test on the Alcotest device. For a proper reading to be attained, the tested driver must blow at least 1.5 liters of breath into the device for 4.5 seconds. Defendant only produced 0.9 liters for 2.9 seconds and 1.0 liters for 3.0 seconds on his two attempts to blow into the machine. After the second failed attempt, the operator ceased the testing process, perceiving that defendant was purposely refusing to blow sufficient air into the device.

Defendant was charged with refusal to submit to a breath test, in violation of, N.J.S.A. 39:4-50.2. He was also issued four additional summonses for driving while intoxicated, N.J.S.A. 39:4-50; careless driving, N.J.SA. 39:4-97; driving with an open beverage container; N.J.SA. 39:4-51b; and following another vehicle too closely; N.J.S.A. 39:4-89. The charges were referred to the municipal court of Carney's Point.

On September 11, 2007, defendant appeared with counsel in the municipal court and entered a guilty plea to the refusal offense. At the same time, the prosecutor dismissed the four other pending charges. Defendant's guilty plea was conditioned on his ability to seek to reopen the matter and withdraw his guilty plea, depending upon

the New Jersey Supreme Court's then-anticipated opinion in State v. Chun 194 N.J. 54 (2008), addressing the validity of the Alcotest device. The municipal court confirmed with defendant on record that "based on what happens I n the Chun case...there may be something in that opinion from the Supreme Court that would allow your lawyer to come back and argue you may have been able to give a full (breath) sample and that that should be considered by [this] [c]ourt[.]" Defendant acknowledged that he understood that limited condition, affecting the entry of his plea, specifically hinged upon the Chun decision.

During the course of the plea colloquy, defendant provided the following factual basis for a refusal violation:

THE COURT: Mr. Osei-Afriyie, how do you plead to a refusal to take a breath test on May 28th, 07?

DEFENDANT: Guilty.

THE COURT: And is the plea voluntary?

DEFENDANT: Yes, please.

THE COURT: Is anybody forcing you to plead guilty.

DEFENDANT: No, no, no.

THE COURT: And you understand that this is going to be stayed in order to get a decision from the New Jersey Supreme Court on the Alcotest?

DEFENDANT: Yes.

THE COURT: And did you drive a motor vehicle on May 28th, 07 at approximately 8p.m. on the Turnpike here on Carneys Point at milepost 2.5?

DEFENDANT: Yes.

THE COURT: And you had been drinking prior to driving?

DEFENDANT: Not really. Not at that time. That all- - during the day. About 1:00.

THE COURT: Okay. But- - I- - may be my question was not very artful, but the question is do you- - were you placed under arrest by the trooper on a suspicion of driving under the influence?

DEFENDANT: Yes.

THE COURT: And did they take you to Moorestown Barracks and request that you take a breath test?

DEFENDANT: YES.

THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

Given this factual basis and defendant's voluntary agreement to the plead (*sic*) guilty, the municipal judge entered a judgement of conviction on the refusal violation. The judge revoked defendant's driver's license for 210 days, and also imposed a $305 fine, $33 in costs, $100 DWI surcharge, and twelve hours of mandatory attendance in the IDRC program. The sentence was stayed pending the Supreme Court's decision in Chun.

After the Court's March 2008 opinion in Chun, which sustained the validity of the Alcotest, on July 16, 2008, defendant reappreared in the municipal court, again represented by an attorney. At that second municipal court proceeding, defendant argued that he had not been afforded a sufficient chance to provide an adequate breath sample on the Alcotest device, in accordance with Chun, because of a medical condition that allegedly restricted his ability to exhale. In particular, defendant noted that he had previously undergone two surgeries to address a stricture in his distal esophagus and that, despite that surgery, he was continuing to have problems with esophagitis and throat irritation that adversely affected his breathing. To support that contention, defendant submitted copies of his two operative reports and uncertified letters from his surgeon, Dr. William Kaplan; a pain management specialist, Dr. Ganesh Balu; and his family practitioner, Dr. Andrew Willet.

Dr. Kaplan, in an addendum to his letter, stated that defendant's inability to breathe enough air into the Alcotest device "could be in part explained by his severe esophagitis that has been treated recently." Dr. Balu noted in his letter that in his "professional opinion...severe throat/laryngeal pain can affect a patient's ability to perform deep exhalation secondary to pain inhibition." Lastly, Dr. Willet stated that, as of June 2007, defendant had been "recently treated for throat irritation and cough."

The municipal judge at the rehearing considered these contentions, including the letters from the three physicians and associated medical documents. The municipal judge also heard testimony from the trooper who had arrested defendant and had observed defendant being placed on the Alcotest device by the operator at the Moorestown barracks. The arresting trooper testified that he perceived that, based upon defendant's demeanor and his interactions, defendant was not being cooperative in providing an adequate breath sample.

Defense counsel further argued that Chun required the operator to provide defendant with more attempts, up to eleven, to provide adequate breath samples, and the defendant's medical condition had not been fairly taken into account in deeming his incomplete efforts, after two attempts, a refusal violation. Consequently, the defense maintained that the guilty plea and conviction should be vacated.

Having considered these proofs and the arguments of counsel, the municipal judge rejected defendant's application to vacate his plea. The judge found no manifest injustice present to warrant such relief. In his oral ruling, the municipal judge noted:

The defendant voluntarily pled guilty in this court on September 11th, '07, he pled guilty and his attorney did an excellent job of convincing the Prosecutor that he could not prove the driving under the influence. That charge was dismissed. The Chun stay was issued. But I do not believe there's been manifest injustice. I do not believe the facts support, in any way, a conclusion that Mr. Osei-Afriyie may not... or cannot give 1.5 liters of volume or blow for 4.5 seconds. There is nothing in the medical records that says that.

At best, there's a general statement by one physician that it is possible that he couldn't give that sample, but,

> of course, we don't deal with possibilities, we deal with probabilities. There is nothing in any medical report that indicates that within a reasonable degree of medical certainty that this defendant could not give 1.5 liters of blow for 4.5 seconds.
>
> I do not see any valid reason to vacate the plea and I will not allow the plea to be vacated.

Defendant appealed the municipal court's final disposition to the Law Division. After hearing oral argument from the State and from defendant, who by that point was representing himself, Judge William Forester sustained defendant's attempt to vacate his guilty plea.

In his letter opinion, Judge Forester independently concluded that defendant had failed to demonstrate manifest injustice to vacate his term of the negotiated plea under Rule 3:9-3 and Rule 7:6-2(b). Rejecting defendant's interpretation of Chun, Judge Forester sustained the municipal court's finding that the proofs were insufficient to demonstrate that the defendant was "incapable of providing the required breath sample due to a medical condition." Judge Forester also rejected defendant's argument, one which was not presented to the municipal court, that his guilty plea must be vacated because at the post-Chun hearing the State failed to produce the Alcotest operator or three of the so-called "foundational" documents generally called for by Chun in Alcotest cases that go to trial.

On appeal to this court, defendant argues the following points:

> POINT I
>
> WHETHER BY LAW, NOT GIVING A FULL ENOUGH SAMPLE OF ONE'S BREATH IN ORDER TO REGISTER A PROPER READING

AMOUNTS TO A REFUSAL TO SUBMIT TO THE BREATHALYZER TEST WITHIN THE MEANING OF N.J.S.A. 39:4-50 [.4(a)] AND IN CONTRAVENTION OF N.J.S.A. 39:4-50.2

POINT II

WHETHER THE LAW DIVISION CRITICALLY EXAMINED THE RECORD AT CARNEYS POINT MUNICIPAL COURT

POINT III

ASSUMING THERE WAS A PLEA BARGAINING, AND THERE WAS NOT, WHETHER THE PLEA WAS ERRONEOUSLY ACCEPTED

POINT IV

WHETHER DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED

We have fully considered the arguments raised on appeal. Having done so, we affirm defendant's conviction and sentence, substantially for the reasons expressed by Judge Forester's letter opinion of November 7, 2008. We add only a few amplifications.

Rule 7:6-2(b) states that a motion to withdraw a guilty plea in municipal court "shall be made before sentencing," although the court may allow the motion to be made at a later time "to correct a manifest injustice." See also R. 3:9-3(3). A

Defendant's application to withdraw a guilty plea is viewed more stringently when it is made after, as opposed to before, sentencing. State v. Slater, 198 N.J. 156 (2009).

We recognize that defendant's guilty plea here to the refusal violation was expressly conditioned on the Supreme Court's then-forthcoming decision in Chun. However, we agree with the Law Division and the municipal court that defendant's reliance upon Chun is unpersuasive on its merit.

We also reject defendant's contention that the Chun opinion's factual references to the Alcotest device's capacity to accept "a maximum of eleven attempts to collect two breath samples," id. at 81, requires operators to administer as many as Previously, in State v. Widmairer, 157 N.J. 475, 498 (1999), the Court recognized that where a motorist suspected as a drunk driver verbally assents to submit to a breath test, but whose subsequent actions fail to carry out the requirements of the test, may be guilty of a refusal despite his words. For example, in State v. Geller, 348 N.J. Super. 359 (Law Div. 2001), the court upheld the refusal conviction of a motorist who failed after six attempts to provide an adequate breath sample to a police officer, even though defendant professed that he was trying to cooperate with the testing. Chun changed none of this established law in construing the meaning of the refusal statute.

Defendant misreads Chun in arguing that the case requires a police officer to administer the Alcotest at least three times in attempting to extract a breath sample. Defendant points to passages on page 81 of Chun, which state that "[i]f the measurements for the first breath test are out of accepted range of tolerance with the measurements for the second breath test, the [Alcotest] machine prompts the operator to conduct a third breath test. Depending upon the relationship among the three tests, the results are reported." Chun, supra, 194 N.J. at 81 (emphasis added). The references in Chun to "three tests" do not concern a situation like the present case involving a subject who provides inadequate breath samples, but instead explicitly

deal with other situations in which sufficient breath is provided to generate a blood-alcohol (BAC) reading, but that the reading is "out of the accepted range of tolerance." Ibid. At a later point in its opinion, the Court explains the meaning of "accepted tolerance," which relates to whether the reported BAC reading is within (plus or minus) certain parameters. Id. at 109-115.eleven attempts before declaring the subject's conduct a refusal. To the contrary, if the operator is unable to extract proper samples within three minutes, one of the authorized options is for the operator to report that the subject refused the test. Ibid. Here, we discern no abuse of discretion or manifest injustice in the operator's decision to stop the process after two tests.

Defendant also has no entitlement to relief from that part of Chun directing the State to modify the Alcotest testing procedures so that elderly women over age sixty are only obligated to provide a minimum volume of 1.2 liters of breath rather than 1.5 liters. Id. at 104, 152. The Court was quite explicit in limiting that proviso to elderly women only. In any event, the Court also clearly directed that "for all subjects, regardless of age or gender" a subject must maintain "a minimum 4.5 second blowing time." Id.at 152. Defendant failed to comply with this requirement.

We recognize that defendant presented letters from his physicians and operative reports attempting to provide a medical justification for his failure to blow sufficient air into the device. However, as the municipal judge and Judge Forester both noted, the physicians did not expressly opine within a reasonable degree of medical probability that defendant physically lacked the capacity to blow the required 1.5 liters of air over 4.5 seconds. The court had ample grounds to find the medical documents insufficient to support defendant's claims.

With respect to the so-called "foundational documents" identified in Chun, supra, at 134-45, and the State's non-production of the Alcotest operator at the plea withdrawal

hearing, we sustain the denial of relief to defendant for several reasons. First, defendant did not raise this argument in municipal court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973). Second, the post-Chun proceeding in the municipal court was not a trial involving rights of confrontation but rather a post-sentencing hearing on an application to withdraw a guilty plea.

Defendant's remaining legal and constitutional arguments lack sufficient merit to warrant discussion.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2210-08T4
MOTION NO. M-00400-09

BEFORE PART: U
JUDGE(S): SABATINO
CHAMBERS

STATE OF NEW JERSEY,
V.
FRANCIS OSEI-AFRIYIE,

MOTION FILED: SEPTEMBER 17, 2009, BY:
FRANCIS OSE-AFRIYIE
ANSWER(S) FILED:

SUBMITTED TO COURT: SEPTEMBER 24, 2009

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 29TH DAY OF SEPTEMBER, 2009, HEREBY ORDERED AS FOLLOWS:
MOTION BY APPELLANT FOR RECONSIDERATION

GRANTED	DENIED	OTHER
	X	X

SUPPLEMENTAL:

Issues of alleged ineffective assistance of counsel are reserved for a future potential application for post-conviction relief (PCR). See State v. Preciose, 129 N.J. 451, 460 (1992).

FOR THE COURT:

SIGNED:

JACK M. SABATINO, J.A.D.

FILED:
ALLELLATE DIVISION
SEP. 29, 2009

RECEIVED
APPELLATE DIVISION
SEP. 29, 2009

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Signed----------
CLERK OF THE APPELLATE DIVISION

THE SUPERIOR COURT OF NEW JERSEY

HONORABLE WILLIAM L. FORESTER, J.S.C
Judge, Superior Court of New Jersey

Salem County Court House
92 Market Street
Salem, NJ 08079
(856) 935-7510, ext. 8357
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November 7, 2008

Thomas A. DeSimone, Esq.
85 Market Street
Salem, NJ 08079

Francis Osei-Afriyie
212 Lone Tree Drive
Camden, DE 19934

Re: State v. Osei-Afriyie

Gentlemen:

Issue Presented

Whether this court should affirm the Municipal Court holding that the defendant refused to submit to a breath test in violation of N.J.S.A. § 39:4-50.2.

Statement of Facts / Procedural History

Francis Osei-Afriyie ("D") IS A 60 year-old male. On May 28, 2007, he received five motor vehicle tickets: following too close, careless driving, driving while

intoxicated, opened container, and refusal to submit to a breathalyzer test. D was required to submit to two breath samples by breathing 1.5 liters into the Alcotest for a duration of 4.5 seconds. He only provided samples of .09 liters for 2.9 seconds and 1.0 liters for 3.0 seconds. On, September 11, 2007, D appeared with his attorney, Thomas Shusted, before the Honorable David Krell and pled guilty to refusing to submit to a breathalyzer test. The other charges were dismissed. However, the sentence was stayed to determine if an adequate breath sample was given on the pending New Jersey Court holding in State v. Chun. D reappeared with counsel before Judge Krell on July 16, 2008 in an attempt to vacate his guilty plea based on the Chun holding. Judge Krell denied vacating D's guilty plea because (1) D did satisfy Chun and (2) the medical reports entered into evidence did not indicate that D was incapable of providing the correct sample due to a medical condition. The sentence that was set forth at the September 11, 2007 hearing was imposed. On August 4, 2008 notice of the Municipal Court appeal was filed with CCMO. In the appeal, some new arguments are raised.

Defendant's Argument

D asserts seven arguments why the Municipal Court should be overruled. (1) The medical reports that he submitted into evidence demonstrated that he was unable to give the required volume of breath due to his medical condition. (2) The State failed to disprove that the medical evidence demonstrated the reasons for his inability to provide the sample. (3) D's Sixth Amendment right to confrontation was violated because the test operator was unavailable to testify. Also, the 3 foundational documents required of Chun, were not admitted into evidence. (4) D submitted breath samples and the operator abused his discretion by terminating the test after only two attempts.

(5) The Judge acted improper by assuming the role of a medical expert.

State's Argument

First, D failed to demonstrate that his guilty plea should have been vacated. A court may vacate a plea or a defendant may be permitted to withdraw a plea if the court determines that the interest of justice would not be served by effectuating the agreement. R. 3:9-3(e). For plea bargaining to be an effective tool, it must be conducted fairly and the result must not disappoint the reasonable expectations of either party. State v. Thomas. A defendant shall not be entitled to withdraw a guilty plea based on a whimsy or a change of mind. State v. Taylor. Here, D entered into a guilty plea and a sentence was imposed. A stay was granted only in the event that the Chun decision would affect the disposition. On July 16, 2008, Judge Krell determined that the medical evidence submitted by D did not indicate that D was incapable of exhaling the required amount of air. Also, Judge Krell found that the Chun decision did not affect the present case because D failed to demonstrate that he is within the the suspect group that the Supreme Court set forth new standards. Second, D failed to establish that he did not refuse to take the breathalyzer test. Even though a defendant agrees to give a sample, further actions by the defendant, such as thwarting its proper operation, can equate to a refusal. State v. Geller. A defendant is required to give at least two samples and failure to do so would constitute a refusal. State v. White. In the present case, D agreed to submit breath samples. D submitted two samples and when each sample was not of the required volume and duration, D, was charged with refusal.

Legal Analysis

R 7:6-2b states that a "motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Furthermore, R. 3:9-3e provides:

> If at the time of sentencing the court determines that the interests of justice would not be swerved by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.

Where the defendant's application is made before sentencing, the defendant has the burden of persuasion to establish plausible reasons as to why his motion should be granted. See State v. Simon, 161 N.J. 416, 444 (1999). Defendant must provide ca factual basis to support his motion to a withdrawal of plea. State v. Lighter, 99 N.J. 313 (1985). Where a plea agreement is entered pursuant to a pleabargain, a defendant carries a heavier burden to succeed in withdrawing that plea. State v. Means 191 N.J. 610, 620 (2007) (citing State v. Smullen), 118 N.J. 408, 416 (1990).

In New Jersey, the courts can "exercise their discretion liberally" and "vacate the plea" if the application to withdraw the guilty plea is made before sentencing and the defendant is asserting his innocence. Statev. Deutsch, 34 N.J. 190, 198 (1961). "[T]he measure of what constitutes fair and just reason for withdrawal must be reposed in the sound confidence of the court." Means, 191 N.J. at 620 (citing Smullen), 118 N.J. at 417.

Our courts recognize the "important interest of finality to pleas." Ibid.; State v. Huntley, 129 N.J. Super. 13, 18 (App.Div. 1974); See also State v. Thomas, 61 N.J. 314, 322(1972) (reasoned that it is "important to ensure that after the agreement has received final judicial sanction, it will be carried out according to its terms"). In denying defendant's motion, the Appellate Division stressed the importance of the "approved philosophy of plea bargaining" which is "dependant on the good faith of both sides carrying out the bargain when it is voluntarily and knowingly made, is fair and just and is ultimately approved by a trial judge." Ibid. The court elaborated that a "whimsical change of mind by defendant will not be a valid reason for altering bargain" and "even a belated assertion of innocence will not upset an otherwise validly entered into plea agreement." Ibid.

The New Jersey Supreme Court stated that "representations made by a defendant at plea hearings concerning the voluntariness of the decision to pled, as well as any findings made by the trial court when accepting the plea, constitute a "formindable barrier"which defendant must overcome before he will be allowed to withdraw his plea." Simon, 161 N.J. at 444 (quoting Blackledge v. Allison 431 U.S. 63, 74 (1977). The Court explained that "[t]hese selumn declarations in open court carry a strong presumption of truth." Ibid. Thus, "a guilty plea voluntarily entered into should not generally be vacated in the absence of some plausible showing of a valid defense against the charges." Ibid. In Simon, even though the defendant recanted his guilt prior to sentencing, he was not permitted to withdraw his plea because, after reviewing the record, the Court found that he had voluntarily and knowingly pled. Ibid.

In the present case, it appears that the interest of justice would be served by effectuating the agreement reached by the prosecutor and D. On September 11, 2007 D voluntarily and knowingly entered a plea of guilty. His sentence was stayed pending the outcome of State v. Chun. He was unable to show that he falls within the group that Chun determined should have a lower criteria for the amount of breath required for a valid sample. Also, nothing in the medical reports that he submitted into evidence indicated that he was incapable of providing the required breath sample due to a medical condition. **The guilty plea was an agreement between D and the State and it was accepted by Judge Krell**. Pursuant to State v. Means, it is good faith for both sides to carry out the bargain.

A. The plea agreement should not be vacated because D is not within the group that Chun determined should have a lower criteria for providing breath samples

In State v. Chun, the Supreme Court of New Jersey stated the four minimum criteria for a breath sample are: () minimum volume of .5 liters; (2) minimum blowing time of 4.5 seconds;(3) minimum flow rate of 2.5 liters per minute and (4) that the IR measurement reading achieves a plateau (i.e. the breath alcohol does not differ by more than one percent in 0.25 seconds." 194 N.J. 54 (2008); 2008 N.J. LEXIS 133, 1, 72-73. **The Court found that the Alcotest is scientifically reliable and that its results are admissible in prosecutions for driving while intoxicated.** The Court determined that "[t]he minimum breath volume requirement should be lowered, for women over sixty years of age only, from 1.5 liters to 1.2 liters " because that group may not have the physiological capability of providing a larger sample. Id. at 5-6. The Court concluded that this modification does not violate equal protection rights. Id.at 5.

The Court in Chun also explained the procedure for administering the Alcotest.

The Alcotest permits up to eleven attempts to collect two breath samples, after which, the only options the device offers are "terminate" or "refusal." If the operator chooses terminate, the Alcotest will reset and the subject can then be given the opportunity for eleven more attempts. If the operator chooses "refusal" the test ends, but the operator is not required to issue s summons for refusal... Charging an arrestee with refusal remains largely within the officer's discretion. Id. at 77.

In the present case, D did not satisfy the breath sample requirements of providing a minimum volume of 1.5 liters and blowing for a minimum of 4.5 seconds. D gave two samples, both of which were below the minimum criteria. D does not fall within the group that the Supreme Court of New Jersey in Chun determined should have a reduced criteria. Even if he was within that group, women over sixty years of age, D still failed to provide the lesser amounts. In addition, D asserted in his July 16, 2008 appearance that the officer administering the Alcotest should have instructed D to provide additional samples since the Alcotest allows for up to eleven attempts to collect two samples. However, there is no requirement that the officer allow all eleven attempts. Only two samples are needed. It is the officer's discretion if two failed failed attempts are sufficient to constitute a refusal.

1) B. The plea agreement should not be vacated because D

was unable to present that his inability to provide the correct breath sample was based on a medical condition .

In Chun the Court had the opportunity to lower the criteria for those individuals incapable of providing the required amount of breath because of medical conditions. The Court chose not to include people with medical conditions. Including D in the group of women over sixty years of age based on his medical condition would probably be an unwarranted expansion of Chun. Furthermore, nothing in the medical reports indicates that D was incapable of providing the minimum breath sample, specifically a minimum volume of 1.5 liters and a minimum blowing time of 4.5 seconds. Although the police report stated that he was "unable" to give a sufficient breath sample, Trooper Christian Cresong testified that he was "unable" to give the proper sample because of uncooperativeness, not inability.

In State v. Chun, the Supreme Court of New Jersey stated, "We have no doubt the device [Alcotest], with the safeguards we have required, is sufficiently scientifically reliable that its reports may be admitted in evidence. Id.at 166. Those safeguards that must be implemented in prosecutions based on the Alcotest include (1) twelve foundational documents must be provided in discovery, (2) the test operator must be available to testify and /or to provide her Alcotest qualifications, and (3) three core foundational documents must be produced into evidence. "[A]ll of the documents relating to working order of the simulator, the reports of the solutions used during simulation and calibration, the certificate of accuracy of the simulator used to calibrate the device, and the temperature probe documents" should be provided in evidence. Id. at 158-159. The operator of the Alcotest is required to be made available for cross-examination or the operator must "produce evidence of his qualification through a certificate or a current operator card." Id. at

152. The three core foundational documents that establish the good working order of the device that must be admitted into evidence include:

(1) the most recent calibration report prior to defendant's test, with part I—control tests, part II—linerity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the analysis of the 0.10 simulator solution used in a defendant's control tests. Id. at 159.

In the present case , it is unclear whether the twelve foundational documents were requested or produced in discovery.**It is assumed that they were not since they are not referenced in the record**. The test operator did not testify, nor did he provide his Alcotest qualifications. Instead, the arresting officer who witnessed the operation of the Alcotest testified. D did not get the opportunity to cross-examine the operator. Furthermore, the three core foundational documents were not entered into evidence. However, D has only raised these issues on appeal. They were not discussed in the Municipal Court. Therefore, remanding the case for further fact finding would be improper.

Based on the on the foregoing, the findings and the decision of the Municipal Court are affirmed. Mr. DeSimone to submit the appropriate order.

Very truly yours,

WILLIAM L. FORESTER, J.S.C.
Dwb

IN THE SUPERIOR COURT
OF NEW JERSEY
CRIMINAL DIVISION
SALEM COUNTY
DOCKET NO: 11-08
A.D. #_____

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
v.	)	OF
	)	HEARING
FRANCIS OSEI-AFRIYIE	)	
	)	
Defendant.		

PLACE: Salem County Courthouse
92 Market Street
Salem, New Jersey 08079

Date: October 10, 2008

Before:

HONORABLE WILLIAM FORESTER, J.S.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE

APPEARANCES:

THOMAS DESIMONE, ESQ., Asst. Prosecutor for Salem, Attorney for the State.

FRANCIS OSEI-AFRIYIE,
Pro Se

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THE COURT

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THE COURT: Okay. And we have Mr. Miller who is here and we have Mr. Afriyie, if I'm saying that correctly, who is here. Let me get rid of this matter, Mr. Afriyie, and w'll take care of that.

(Pause)

THE COURT: All right. While she's working on that, I think we can move Mr. Afriyie's matter, can we not.

(Judge speaks about other matters)

THE COURT: Mr. –it's Francis Afriyie. Mr. Afriyie, you want to come forward, sir, and if you'd utilized that microphone there for us, please.

(Pause)

THE COURT: Okay. If I say Afriyie would that be the right?

MR.AFRIYIE: (This microphone is not functioning). Osei-Afriyie

THE COURT: Afriyie, Okay. Mr. Afriyie appears pro se in this municipal court appeal. For the State?

MR. DESIMONE: Your Honor, Thomas Desimone, appearing on behalf of the State.

THE COURT: Mr. Afriyie, I've had a chance to review your submission, so I know why it is that you are seeking this appeal. I'm to ask you if there if there is anything you want to add further, but, first, let me just put in the factual predicate here.

This matter arose because back on May 28th, 2007 Mr. Afriyie received a series of motor vehicle summonses that –the one that's in question here was a –what is referred to as a refusal, and that is a refusal to submit to an alco test examination.

Ultimately, on September 11th Mr. Afriyie appeared with his attorney, Thomas Shusted, and entered a plea which was conditional to the refusal, a plea of guilty that is, and reserved certain rights, because at that time State versus Chun which was a leading case at that time pending, had

not yet been decided. It later was decided and, accordingly, the , matter was brought back for subsequent hearing before Judge David Krell and that –the first hearing was on July 16th, 2008 and then later on September the 11th—strike that. Let me start over again. The first hearing was on September 11th, 2007 and the subsequent hearing before Judge Krell was on July 16th, 2008. At which time after—Mr. Afriyie was represented again by Thomas Shuster (sic). After hearing arguments it ultimately resulted in Judge Krell determining that the guilty plea was appropriate, should not have it withdrawn and Mr. Afriyie was sentenced, however his sentence was stayed pending this appeal.

Now, Mr. Afriyie, the question here is and I know that you have submitted a comprehensive brief, and you make arguments and some of them are appropriate arguments. I don't meant that they're going to be sustained, but the are appropriate, but some of the other arguments you make—how can I say this diplomatically—they—reflect that it was done pro se and not by a lawyer, in order words, and that's not bad. You did this on your own and it's –it's well done for the most part. I'm not criticizing you, but I'm also—they are also a very highly technical area that we're dealing with here, not the least of which is the standard that this Court needs to use.

For example, just by way of example, you submitted at the trial below medical certifications concerning your condition, right?

MR. AFRIYIE: Yes

THE COURT: And they were considered by the Court. As part of your submissions, however, you have submitted additional information, --

MR. AFRIYIE: Yes.

THE COURT: - - And that additional information is not properly to be considered by this Court. And the reason for that is that this is a trial on the record. So, the record consists of the transcripts of the two hearings and certain

other documents, but I could not consider for you or for Mr. DeSimone the same way; for example, if Mr. DeSimone says, Judge, I now have some additional medical reports that I want you to look at, I would be saying the same thing to him. If he were to say to me, Judge, I have another witness here, I want to call Trooper- - he had a very unusual first name, starts with an e, can't remember it, last name is Smith, I want to call him now because Mr.—Mr. Afriyie says - - takes exception to the fact that he did not testify at time of trial, I can't do that either. So, --and there's certain other things. I could go on, but, again, I don't want to appear to be critical of you or your work.

My question is to you would it -- do you feel that you should have the services , if not Mr. Shuster –Shusted, rather, some other attorney, because, as I say, this is- - this not a truly discretionary decision that this Court will make. In other words, I'm not going to take another look at it and say, well, you know, I think this or that. It's tightly controlled by the laws is what I'm suggesting.

So, just in those two areas, but there are other areas as well. Well, I don't want to go on and –in other words, you-- --you say that Judge Krell acted improperly by assuming the role of a medical expert, see,--

MR. AFRIYIE: Yes.

THE COURT: --and I know why you say that, and I understand it at one level, but an expert opinion was delivered. Judge Krell did not accept that, and there may some reason why he didn't, and I would not expect someone who is not a lawyer to know what those reasons were. For example any medical report has to be couched in terms of a degree of medical certainty.

MR. AFRIYIE:Yes.

THE COURT: Your reports that you submitted said—I'm paraphrasing it. I could read it to you, but you are more familiar,--

MR. AFRIYIE: Yes
THE COURT: --it said that Mr. Afriyie—Afriyie's condition could have been the cause for him to not be able to submit an appropriate sample.
MR. AFRIYIE: Yes.
THE COURT: Well, from a judicial prospective that's not enough. It could have been, but on the other hand if I say something could have been, well, it could not have been as well. So all of this is preliminary to my question for you today do you not feel that it would be more appropriate I will continue the stay for a short period of time unless Mr. Desimone has filed an objection to allow you to consult with an attorney to prosecute this appeal. I think it would be in your best interest, but certainly that would be up to you. Understand all that Mr. Afriyie?
MR. AFRIYIE: Oh yes, Oh yes, I do.
THE COURT: Yes.
MR. AFRIYIE: I think I will—going to do it myself.
THE COURT: You want to do it yourself?
MR. AFRIYIE: Yes.
THE COURT: All right. And, I just want to make sure, because it's - - as I say, you're going to hear in a few moments that it's a complicated issue, and it's not just one issue, and there are certain rules of evidence that are going to be called into play here that - - well,- -
MR. AFRIYIE: Judge, before you finish, you say that I obtain some other documents which were not produced at the Court below.
THE COURT: Correct
MR. AFRIYIE: Ah,--
THE COURT: Some were produced, and I have those as well, - -
MR. AFRIYIE: Yes.
THE COURT: --but the new information, in other words, is what I can't consider.

MR. AFRIYIE: Yes, but the new information, here what go into this the –to prove that the Judge was wrong.
THE COURT: That's see- - that's what I can't do. See, let me- - Let me back up.
MR. AFRIYIE: That is fine.
THE COURT: See I can't hear that because it was not part of the trial below. That information should have been part of the information before Judge Krell, and if it had been he would have considered it, perhaps, but you don't get another chance, in other words, to submit additional information, is what I'm suggesting to you.
MR. AFRIYIE: But as soon as he made those statements, trying to interpret the medical evidence he went and concluded and give this, and so I didn't have any chance to prove to him that he was wrong.
THE COURT: Well, that's - - we 're back to where we started. We started with my advising you that –that additional information- -
MR. AFRIYIE: Uh- huh.
THE COURT: - - even if it's - - even if it's appropriate, it's good information, we are limited to what was here not— nothing new.
MR. AFRIYIE: Yes.
THE COURT: So the propriety of is not - -
MR AFRIYIE: Disregard those.
THE COURT: Yes. I have to disregard. It's not because I- - not because I choose to.
MR. AFRIYIE: Sure.
THE COURT: All right.
MR. AFRIYIE: That's fine
THE COURT: Do you understand?
MR. AFRIYIE: Disregard it.
THE COURT: Okay.
MR. AFRIYIE: Uh-huh.
THE COURT: All right. So you sure you want to proceed yourself?

MR. AFRIYIE: Oh, yes.
THE COURT: Okay. Good. And, I'm not trying to talk you out of it, but I would suggest I would give some additional time, --
MR. AFRIYIE: Yes.
THE COURT: -- continue the stay so you wouldn't pay any additional penalty, and consult with an attorney so that the issues could be better framed, because that's just one of them. That's just one. And I trust you understand that.--
MR. AFRIYIE: Yes.
THE COURT: --that we limited to – I'm limited to what it was that was submitted below.
MR. AFRIYIE: Yes, but I also understand that the Court can go beyond that and- -
THE COURT: That's where I- - that's where your understanding in incorrect. If that's your understanding it is incorrect.
MR. AFRIYIE: Okay. I don't have time to review this, but that's fine. I think that Courts can do that.
THE COURT: It's not a choice that I'm making.
MR. AFRIYIE: Okay.
THE COURT: It's not a choice that I'm saying, well, should I do this, no maybe, yes, maybe no. Additional information that would be submitted at this time I'm not permitted to hear that. That's why it called a trial on the record, --
MR. AFRIYIE: Yes. Understand.
THE COURT: -- and the record is closed. no—I can't have any additional testimony or any additional information. All right.
MR. AFRIYIE: Okay. That's fine
THE COURT: You tell that—you tell me that you have seven arguments why the Municipal Court should be overruled. I'm going to give you a chance to address all of them, but--
MR. AFRIYIE: Yes.

THE COURT: -- just so the record in this case is clear, you tell me that medical reports that you submitted demonstrated that you were unable to give the required volume of breath?
MR. AFRIYIE: Yes.
THE COURT: Yes. You tell me that the State failed to disprove that the medical evidence demonstrated the reasons for your inability to provide. You tell me that your Sixth Amendment right to confrontation was violated because the operator was unavailable to testify, - -
MR. AFRIYIE: Yes.
THE COURT: - - and you tell me that the three foundational documents required were not submitted into evidence, and you tell me that the submitted breath examples that he- - that he, the operator, violated or abused his discretion by terminating the test after only two attempts, and the, finally, the Judge acted improper by assuming the role of a medical expert. So, I've read your submissions, but if there is anything that you want to highlight to me concerning those arguments I would certainly want to hear them now.
MR. AFRIYIE: Yes, Before I do that , I think I have to say a word or two about my brief and what I received from I think Ms. Hussy, something like that, the lady here.
THE COURT: Okay. Mr. DeSimone submitted a brief.
MR. AFRIYIE: I just received this a few days ago. He didn't - - I didn't get a copy from him. I just got this.
THE COURT: And what is it, Sir?
MR. AFRIYIE: Through his brief- - I- - I thought that he was supposed to send me a copy. What I did do was I sent back to my return receipt requested and also the overnight delivery. He got it the following day and if we—does it in due process, I think he should have--
THE COURT: He should have.

MR. AFRIYIE: --sent me a copy. I called the office, and they they—they mailed me this. And, it is stamped here October the 6th.
THE COURT: I –think you are correct in you should have --
MR. AFRIYIE: I--
THE COURT: --you should have received a copy. I have a copy.
MR. AFRIYIE: He send me a copy.
THE COURT: Yes, I have both copies. I don't know what you have, but--but
MR. AFRIYIE: Judge, mine is stamped October 10, from tis office.
THE COURT: I see.
MR. AFRIYIE: Do you want to see it?
THE COURT: No. I take your words for that, sir, so--
MR. AFRIYIE: And, he didn't indicated that he had sent me a copy. He never did.
THE COURT: You should have a chance to review it. I certainly agree. So, with that in mind, do you need additional time? I'm happy to give you additional time to--
MR. AFRIYIE: Well, I just want to bring it to the Court attention this is a violation of my constitutional right toward the due process amendment. I think number 14.
THE COURT: Okay. Assuming that you are right, I want to make it right for you.
MR. AFRIYIE: Yeah, okay.
THE COURT: So I can't go back and change history, but what I can do is allow you additional time if you require it, to either respond to it, to study it, to look at it and address the issues, but I would agree that it would be--
MR. AFRIYIE: What I did do is that I couldn't get enough sleep. I had to use my computer and all that stuff for the past two days, trying to respond to these questions to the way he answered it, but, incidentally, he did not answer my brief. He just set it aside. He never even answered the

question with all my argument. He never did. He should have looked at them.
THE COURT: I have them both. I have read them both. I didn't--
MR. AFRIYIE: Yes.
THE COURT: I didn't know you had a copy, but again, --I hear you. I think you are right. He had yours.
MR. AFRIYIE: Yes
THE COURT: For some reason, mistake, inadvertence, whatever the reason you didn't get a copy, but here we are, and now that we have that on the table if you want additional time I'll it to you. If you want to proceed today let's do that, but what I don't want you to do is to say didn't have enough

time, let's proceed, I'm under a handicap. I mean I can schedule this for two weeks or three weeks, you know, to give--
MR. AFRIYIE: That is fine. Okay. If you could put it in the record that he never responded to--
THE COURT: Well, it is on the record.
MR. AFRIYIE: That's fine.
THE COURT: But that does not give you information should you lose this case on appeal, because I'm giving you the opportunity to read it thoroughly and carefully as you should have had the opportunity to do, and respond to it if you choose to, but if want to waive that and proceed anyway that's okay too.
MR. AFRIYIE: Yeah. I'm waiving that too.
THE COURT: All right. Okay. Tell me sir, then why—if there's anything you want to highlight that is not new material, we've covered that, as to why this Municipal Court decision was improvident or incorrect legally speaking and should be reversed now would be your chance to tell me why.

MR. AFRIYIE: I will deal with my brief in a minute, but in the lower court actually admitted the motion that the plea—not the plea—the guilty plea should be withdrawn, and the Judge overruled him. My point here is it was –his ruling was abuse of discretion. Certainly he had the discretion to say yes or no to a motion, and that discretion is abused if the ruling is based on untenable grounds or is it. And I will give you the reason was based upon tenable ground. And, if my reason is supported a reversal is warranted.
THE COURT: Okay.
MR. AFRIYIE: It is warranted if a different court would have given a different ruling. First of all, I admitted a guilty plea because of what the Court told me. New Jersey has a Statute about refusal, and there are elements of refusal.
In State versus Cummings on page four of my document here you talk about the policeman arrested you. The policeman put you—or it says here believed that you were driving and were in physical control of the vehicle and one element is whether or not the person refused to submit to a test upon request of an officer.Okay. And, it goes on to say that if all the elements are not established then no conviction shall be issued. Judge Weine—sorry—I'm using Judge Weiner, because I went to the United States District Court and that was I defended myself. His name was Judge Weiner. Incidentally, he overrule against me, and this is in District of Pennsylvania. I appealed to the Court of Appeals and I won. I did it myself.
But, anyway, when he defined this sentence he indicated that if you submit a breath test and you produce inadequate form that amounts to refusal. And I said , Your Honor, okay—I pled guilty. I didn't know that producing enough volume did not amount to refusal. If I had known I wouldn't have pled guilty. There's no way I would have done that. That is my first point I want to make, because he misconstrued all the—misinterpreted the law.

So, the basis for my pleading guilty was misinterpretation of the law. And, you can see from the transcript. Do you want me to reflect it, Your Honor, or you've seen it?
THE COURT: No. I'm reading it. He—he cited you to the—and told you that you blew, in other words, that you emitted a certain volume, --
MR. AFRIYIE: Yes.
THE COURT: --which he explains here, and your attorney was there. And, I'm not quite sure that I'm understanding your point. Are suggesting to me that --
MR. AFRIYIE:Your Honor, this is on page nine. Is that where you are?
THE COURT: Yes.
MR. AFRIYIE: Okay. So, he said and do you agree that it was a good enough sample of your breath in order to raise a proper reading. I said yes. Then he said I therefore—and that, therefore, that amounts to a refusal. That is inability to give enough volume of breath was tantamount to refusal.
THE COURT: And do you dispute that?
MR. AFRIYIE: That's not true according to the law.
THE COURT: What—and what law would you cite me to that would get you that result?
MR. AFRIYIE: This is New Jersey NJSA 59. all minus 54-8.
THE COURT: All right.
MR. AFRIYIE: It says "Whether or not the person arrested refused to submit to test upon request of the officer this is one of the elements in connection with the refusal." It doesn't say that failure to produce enough volume of air was—is tantamount to refusal.
THE COURT: I see. Okay. I understand. I understand that point.
MR. AFRIYIE: Yes. That is one—that's one case. So what I'm saying is that I pled guilty because of what he told me the law was, and he was wrong. That's point number one.

Point number two- - I know this is from that , but I—mine and you guys are all the same.
THE COURT: No, don't take me there. We guys are totally different. There are 50 of us around, including Hawai and Alaska and each state has a different set of rules and laws, and a Delaware case, although it might be appro ops there, wouldn't help me here.
MR. AFRIYIE: But what the standard of review is, is what I'm going to talk about, that is whether or not—and I've said what, but, Judge, abuse of discretion, whether or not the Judge applied the law correctly that is an interpretation of the law if he admits a mistake it's reviewable by a higher Court, and that is what I'm asking this Court to do.
THE COURT: Okay.
MR. AFRIYIE: So what I have said pinpoint the fact that he misinterpreted the law.
THE COURT: Okay I understand that. You are correct.
MR. AFRIYIE: Very good. Okay. So, that's one point. And that goes long with the abuse of discretion. I think the State is in agreement with me that State versus Chun this Court's rule in this case, I don't think they dispute that, that is Court's ruling of what happened here and we will throughit in a few minutes. I have read it about three times.
Going back to my brief, and then I will touch on it in a minute—okay, first of all, I do indicate element that there's insufficient evidence to support conclusion. Here—and do you have it? I'm going to read it. " A trial Court's interpretation of the law and the questions that flow from established fact are not in conflict to " (indiscernible- heavy accent). And, it's New Jersey 148 366 page 348. I use this in connection with what I have just indicated.
THE COURT: All right. That's –that's rather text book material and we're all—all lawyers are familiar with that general principle.

MR. AFRIYIE: Okay.
THE COURT: Yes. That's standard.
MR. AFRIYIE: So, tha's fine. Let's get number two is that this inference to meet its burden. You see, once I produce the particular evidence which created doubt in State's brief, but which I did—they were to prove that I could produce enough volume to do it. That was their burden of proof. Okay. And, in doing that they showed that the alcohol—alcohol test, and they also brought over a person to do such—that is to give evidence. When the finished I showed evidence to the medical records that I'm a sick man, and I'm still a sick man, and I couldn't do that.
Okay. The burden shifted from me to the State to disprove my case. And my lawyer had sent them a letter. I don't think you have a copy of it. – if I have it. Oh, there it is. The last page indicates—this is from Mr. Shusted—to say "Please" –talking to the State—"please provide me with a copy of the State's rebuttal report prior to the scheduled court date.." If you want to see it--
THE COURT: I'll take your word for that,--
MR. AFRIYIE: Yeah.
THE COURT: -- but there's
MR. AFRIYIE: He wrote to the State. He did send them a copy of my medical records. They had it more than a month in advance, that, please provide us with a rebuttal report about the the medical records, the different date. And when we met on July 16th they necer brought the new medical expert there either to refute.
So, in order words, the doubt created in the case was established. And, you know that in criminal cases or certain criminal cases according to all what I have read here, they still had the burden of proof and to prove it not by a preponderance of the evidence, but by reasonable doubt. I created that doubt and they didn't produce any rebuttal.
THE COURT: But they are not required to Mr. Afriyie. This is one of these things that I--

MR. AFRIYIE: Okay.
THE COURT: --started talking to you I n the beginning. The State is not required to produce. The question was--
MR. AFRIYIE: Uh-huh
THE COURT: -- whether your proof rose to sufficient level. The judge found that it did not.
MR. AFRIYIE: Okay. That is fine.
THE COURT: That's –so they weren't required to produce- - I mean, we don't need to spend time on that.
MR. AFRIYIE: That's fine. That's fine. They said they didn't have the burden to disprove whatever I said, then whatever evidence ' give Judge Krell will say that it didn't rise to a certain level that he could have disregarded it. This I'll go back to the alco test in a minute. Let me finish my—I'll goback to the alco test.
THE COURT: Sure.
MR. AFRIYIE: On the Sixth Amendment right, State versus Chun goes (indiscernible- heavy accent) to indicate that the person who conducts the test should be present at trial. And all the foundation—they either—all the foundation documents should not be produced or cannot be produced, but they do say that to—as a matter of fact, you know, not to violate the defendant's Sixth Amendment right he has to be there. He wasn't. I think you have read my brief where I quote Chun.
THE COURT: Yes. I'm familiar with that. You know, and I don't want to appear to be quarreling with you but, but--
MR. AFRIYIE: No. No. Do ahead.
THE COURT: --this is the same reason that I offered you an opportunity to have the attorney present, because--
MR. AFRIYIE: Uh-huh.
THE COURT:--the problem with that argument is as follows:--
MR. AFRIYIE: Uh-huh.
THE COURT: --it would have been better--
MR. AFRIYIE: Uh-huh.

THE COURT:-- had the officer been present.
MR. AFRIYIE: Yes.
THE COURT: No question about it
MR. AFRIYIE: Uh-huh.
THE COURT: --but you'll recall that--
MR. AFRIYIE: Uh-huh.
THE COURT: --that-- because then there would have been someone to testify as to the volume that you submitted, right?
MR. AFRIYIE: Uh-huh.
THE COURT: But you'll recall that without objection--
MR. AFRIYIE: Yeah.
THE COURT: --at time of trial--
MR. AFRIYIE: Uh-huh.
THE COURT: the medical report that had all that information in it—strike that—not the medical report, the alcohol reading information--
MR. AFRIYIE: Uh-huh.
THE COURT:--was submitted and it became part of the record.
MR. AFRIYIE: Yes.
THE COURT: So I have it, you've have read it, Mr. DeSimone has read it--
MR. AFRIYIE: Uh-huh.
THE COURT: --and it in evidence without objection. The signatory of that report was the gentleman who's Smith and his first name starts with an c that I was telling you about before,--
MR. AFRIYIE: Uh-huh.
THE COURT: --he—he wasn't there, but his report was admitted without objection, you see?
MR. AFRIYIE: Yes.
THE COURT: It's the same problem with the doctors.
MR. AFRIYIE: Uh-huh.
THE COURT: The doctors weren't present either, correct?
MR. AFRIYIE: Uh-huh.

THE COURT: But the doctors' reports were admitted--
MR. AFRIYIE: Uh-huh.
THE COURT:--with some objection by the State, but it was later withdrawn. So the medical reports that you submitted are in evidence without objection--
MR. AFRIYIE: Uh-huh.
THE COURT: --and the readings information—well that's wrong. There was no reading because there was—the State claimed that you refused. I understand your point, but the volume information was in a report.
MR. AFRIYIE: Yeah.
THE COURT: --and it went into evidence, and now it's part of the case. So the fact that he wasn't there at the time is sort of moot. Now, it was a very good point back then, but it's not a very good point now. Do you see--
MR. AFRIYIE: Okay. I--
THE COURT: Do you understand? Do you understand what I'm saying?
MR. AFRIYIE: Yes. I understand what you're saying?
THE COURT: Good.
MR. AFRIYIE: I can read this again. I tell you that, in fact, what they did was that initially they wanted to say that this person wasn't needed. They went through trying to say that this person wasn't needed, but there was- - they went again and give a justification as to why he should be there, but if you are telling me mine was accepted and he was also accepted at this point but--
THE COURT: Neither one of the should have been accepted,--
MR. AFRIYIE: Yes.
THE COURT:--bluntly,--
MR. AFRIYIE: Okay.
THE COURT:-- frankly. When—when--
MR. AFRIYIE: Oh,--
THE COURT: -- when the medical reports were aubmitted and there was no doctor there to testify, to be --

MR. AFRIYIE: Yes.
THE COURT: --cross examine those reports should not have come into the case. Krell maybe should not have heard them. I certainly shouldn't see them, but they were admitted. Likewise, when the provider of the document, Trooper Smith was not there, that shouldn't have come into evidence either, but it did.
MR. AFRIYIE: I'd like to tell why—why I'm saying that it shouldn't have been accepted at all apart from your argument. My argument here is this: State versus Chun for an alco test- - made two indicates that there must be first test- -
THE COURT: I'm sorry?
MR. AFRIYIE: There must be first test.
THE COURT: First test, yes.
MR. AFRIYIE: Yes. There should be a second test. And, specifically indicate that there will be a count as to that, and there should be a third test. Okay.
THE COURT: Okay.
MR. AFRIYIE: There should be three tests at a minimum before there could be a refusal. Let's look at page – I don't know whether you have page 118 or something. This one is page 119.
(Pause)
MR. AFRIYIE: Bear with me. I'll be right with you.
(Pause)
THE COURT: Maybe I can help—maybe I can help you. What are looking for?
MR. AFRIYIE: No. It is my - - I remember that is my brief where I do say something to that. Yeah, okay. On page 14 of my brief.
THE COURT: Page 14 of your brief, yes, sir.
MR. AFRIYIE: Yeah. Uh-huh. This is Chun speaking: "With the measurements for the first breath test are out of the subject rate of tolerance with a measurement of the second breath test." We've had two breath tests now. The

machine prompts –prompts the to conduct a third breath test. It keeps on- - it keeps on. The device gives the operator three minutes to collect a sample. If the time has passed without a sample the device will present with three options. That is after the third test, then the device would present three options to the operator. The options are to repeat the test, report that the person refused the test or continue the test.
So after the third breath test the operator is given three options. One of them is to indicated that the person refused the test. In my case, - - and the report is here.
THE COURT: There were only two tests.
MR. AFRIYIE: No. There were only two tests.
THE COURT: I understand.
MR. AFRIYIE: Very good. So he admitted it, in fact, it was zeros. He made a big mistake. If you you'll go page 14 the Supreme Court said this- - they kept going. They said it said- - it said that the alco test is not operator dependent, meaning that the dependent is not subject to the influences from the operator, and the operator place a relatively lesser rule than possibly the breathalyzer. The Court listed the rule now is clear by the operator. I have it here. It's lighter. It is the report , but I have written it here too. I read the whole thing. He said the record was done- - this is what he said. He said the record was done, the operator will plead a relatively lesser rule than has been with the case in the past. His rule now consists of observing the subject the insure that 20 minutes has passed and to be certain that the subject has not swallowed or regurgitated - - regurgitated. In theis circumstance (indiscernible- - - heavy accident) that would influence the test results.
The operator- - this rule also includes imputing the - - and verifying the operation of the test. I think finding for which he needed to start the sequence. Another rule is changing the control solution, election to do so. Another rule, attaching the new mouth piece, reading the instructions- -

THE COURT: Mr. Afriyie, you know, again I don't want to appear quarreling with you on this, but that - - everything that you're reading is- - accurate, but - -
MR. AFRIYIE: Uh-huh.
THE COURT: - - but wait.
MR. AFRIYIE: Go ahead.
THE COURT: The preface of what you're reading is requirements for the admissibility of alco test results; so if there had been a result that said Mr. Afriyie's blood-alcohol reading was .14,- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - it didn't because- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - the State claims you made a refusal, then all that you're talking about would come into play, - -
MR. AFRIYIE: Uh-huh.
THE COURT: - - but you're taking- -your taking us down a path- -
MR. AFRIYIE: Uh-huh.
THE COURT: - - that doesn't application, see? So, you know, I don't- -
MR. AFRIYIE: Okay.
THE COURT: I don't want to cut you off, but - -
MR. AFRIYIE: Sure.
THE COURT: - - that would have great application if there had been a reading, a blood-alcohol reading that was - - that was improperly done, but it never got to that point, says the State, because you refused.
MR. AFRIYIE: Yeah.
THE COURT: That's- - that's - - so all that you're reading to me is all accurate information, but it doesn't relate to the issues that are before me. The issue before me is did you refuse not whether or not the machine was properly calibrated, whether or not there was a purge, whether - - you see- - the difference?
MR. AFRIYIE: There is no problem. Go ahead.

THE COURT: Okay.
MR. AFRIYIE: No.
THE COURT: Okay.
MR. AFRIYIE: I- - I—I didn't refuse, because he was supposed to observe me at least for the third test. He never did. And, he was supposed to only sit down there. He was supposed to pull in the prompts. He never did. Instead, he's being passive. He was passive. He was actually a participant. All he did was you stop the machine without me giving a refusal. Why did you stop me- - sitting around instead of (indiscernible- - heavy accent).
THE COURT: Okay. So, you're saying he is required ti give you three chances like baseball, - -
MR. AFRIYIE: Minimum.
THE COURT: - - right?
MR. AFRIYIE: Minimum.
THE COURT: Okay. All right. I understand your argument. That two is not enough, he was required to give you three.?
MR. AFRIYIE: He didn't do it.
THE COURT: And, he didn't do it.
MR. AFRIYIE: He wasn't following the prompts. He was supposed to follow the prompts. He didn't follow the prompts. He just stopped. He said I don't need you.
THE COURT: Okay.
MR. AFRIYIE: Do you see what I'm?
THE COURT: I do see what you're saying.
MR. AFRIYIE: The prompt said go ahead, he said no, I'm not going ahead.
THE COURT: Okay.
MR. AFRIYIE: So I never had a chance.
THE COURT: Okay.
MR. AFRIYIE: That's my argument. That's why I'm saying that the whole- - that's okay. Because the guy didn't do for me what he was supposed to do. And, you mentioned this, but the Judge- - a judge- - first of all before

you become a medical expert you should be qualified to do that. Thatis the standard. Could have taken the chance to qualify the Judge, that if it could be done by substitution I don't know. Would have qualified you to give an opinion. Whether or not- - what the doctors were saying were correct.
He chose upon himself to become the medical export and I don't think that is the role of a Judge, but that's what I'm saying.
THE COURT: That's - - you know, that, - - do you see those chairs over there?
MR. AFRIYIE: Yes.
THE COURT: They are for the jury.
MR. AFRIYIE: Yes.
THE COURT: Do you know that not only the Judge but those jurors would have had a chance to pass - - if it had been a jury trial- -
MR. AFRIYIE: Yes.
THE COURT: - - the jury would have passed on the efficacy or the appropriateness of the medical opinion and none of them ever went to any school beyond high school. They would have that chance , see?
MR. AFRIYIE: Very good. No, but this is different from leaving it up to the jury to make that decision. The jury certainly would have listened to the medical expert, but the medical would say, oh, no, he wouldn't say.
THE COURT: Okay.
MR. AFRIYIE: And they do- - conducted- -
THE COURT: I understand the point. He couldn't have- - nobody could have listened to the medical experts in this case because he wasn't there.
MR. AFRIYIE: He wasn't there, but he chose to be- - to be the medical expert, so he was the Judge.
THE COURT: And he made himself - -
MR. AFRIYIE: And he was the executioner, because he passed the sentence, see?

THE COURT: I understand.
MR. AFRIYIE: And he became the proxy prosecutor.
THE COURT: I understand your point.
MR. AFRIYIE: Then, in fact, what he also wanted to do was to use the law of provability. If you remember, I think you've seen what he said. He said- - he didn't use the word probability. He said medical second, okay. And, his argument was that we deal - - we don't deal with probabilities- - no. I think he used the law. Not probable, but likely, Let me see what he said.

(Pause)

MR. AFRIYIE: Well, let's see here. Let's see. Oh, yeah, okay. He said at best it was a general statement made by one physician.. And that was known to two physicians, you see? This is - - he said at best there is general statement by one physician that it is probable- - it is possible that he couldn't give that sample, but of course we don't deal with probabilities - - we deal with possibilities - - we deal with possibilities. We deal with probabilities.
Well, you see my brief here where I mentioned that probabilities- - when probability is zero it means it's almost unlikely. It will never happen, but if the probability's one that it's certain I think it will happen. And in between that is a - - that's - - when you attach confidence, you attach confidence to it. It was the State's burden to prove that Icould have produced verified- - the State did nothing. They didn't bring any medical expert to prove that that wouldn't have done that. And if they didn't do that the probability that it would have produced a required volume not zero, but at least I produced three pieces of medical evidence, two of which indicate that my inability to give that amount could have come about because of my physical incapability. And, from the law of probability that means that at least there was two out three chances that I couldn't have done that.
So, with this logicthe State- -

THE COURT: Okay, I understand your point. I understand your point.
MR. AFRIYIE: Yeah, Okay. So, that is it. Let me briefly touch his stuff. I read it and I will give - - operator is there. It's not a brief. Matter of fact, he just said that I will agree to send you a letter. And, this main point throughout the whole attempt is this, that there was a - - like an agreement. There was a plea bargain and they expected a consequence. I expected some result out of it. And I should be held responsible to fully - - that is I should- - I shouldn't - - I should not negate my promise. Promise was that I accept me to plead. My point in connection with the whole thing is that it was a guilty plea which was wrong from this time, that is we didn't - - I knew the consequence. The consequence was the imposition of the sentence and all that so, okay. **What led me to plead guilty was the misinterpretation of the law.**
If they get up leaving me, - - according to interpretation, **I wouldn't have pled guilty in the first place**.
THE COURT: Mr. Afriyie, thank you very much. I understand all of your arguments. I trust you didn't find me to be quarreling with you, but - - but again you're in areas that are probably not as familiar with so- -
MR. AFRIYIE: Yes.
THE COURT: I think you did an excellent job, but let me hear from Mr. DeSimone, for the State.

Argument - Desimone

MR. DESIMONE: Judge, just briefly, I did outline in my brief my arguments. Essentially, they are that this individual entered a guilty plea. It was knowing. It was voluntary, and the only real question was because State versus Chun was still in it's - - still being reviewed by the Supreme Court that as with all of the alcotests during that periodof time that Chun may have added some new information or changed the way the tests were done, and

everyone was kind of holding their breath waiting for Chun to be announced so that we could all then be on the same page and continue with - - with these cases that were pending, including the Gentleman's.

Unfortunately for him, Chun did not - - the only group of people that Chun addressed specifically in reference to their ability or their inability to give the propervolume for the alcotest was women over 65 years of age, Judge. They were the only class that- - the Supreme Court specifically addressed that because of their - - of that group of individuals that it may have an effect on the machine or their inability to exhale the required volume.

The Court did consider the medical evidence that was submitted, and found that it did not meet the threshold to indicate that, as the Court earlier said, within a reasonable degree of medical certainty that this individual could not produce that volume.

So, it was twofold. The Court had medical evidence that didn't establish that he could not produce the required volume and Chun did not give any additional guidance in reference in reference to every other individual except women 65 years or older that may be affected by their inability to give the volume. **And that's the real issue was did Chun add anything that Judge Krell could have considered in reference to this gentleman's case and it did not.**

I know his argument is that , you know, he did not refuse, because he attempted to take the test. Now, I addressed that ir my brief, because the implied consent that you will take a breathalyzer has been interpreted to mean that you also - - there's an implied consent that you will do the test properly or at least attempt to do the test properly. The state trooper in this particular case gave this gentleman two opportunities. I think that weas all he was required to give before he determined that this individual refused to take the test.

In his brief he quotes Chun and , again , Judge, that language as I read it would indicate that the only time a third test is done is if the machine is registering a number, but the first number is out of sync with the second reading and the the machine purges itself and requires a third testto try to come into some kind of conformance with if there's something malfunctioning someone should not be punished for the malfunctioning of the machine. I don't interpret it to maen that they- - that the operator's required to give them 11 tests, which apparently the alcotest will take 11 tests.

The very next paragraph the device gives the operator three minutes to collect each sample. If that time expires without a sample, which I would indicate if you don't blow hard enough, it's not going to register a sample, the device would present the operator with three options: the option to terminate, report the person has refused or continue. I this particular case the Trooper after two tests determined to not require any more testing and then had made that decision that this individual had refused the test.

I have outlined in my brief the different interpretations of a refusal and our courts have considered refusals including at least giving at least two attempts before it would be considered a refusal, **and it's the State's position that the guilty plea was entered.** There was really a question of would Chun have affected any of the documents that were presented. They did not. Again, Judge Krell did consider the medical reports that were submitted, and just did not find that they rose to the level to indicate that this individual was – did not have the ability to exhale the required volume to register on the machine, Judge.

THE COURT: All right. Mr. Afriyie, I thank you. Mr. DeSimone, I thank you.

MR. AFRIYIE: Judge can I- -

THE COURT: Yes. You need to- - yes, some additional comments- -

MR. AFRIYIE: Yes.

THE COURT: - - Mr. Afriyie.
MR. AFRIYIE: I've read Chun and even though Chun actually goes at length to talk about the situation as far as a woman is concerned, but Chun also says and reiterated the previous order that says we ordered that first offrnder cases, in which case like mine- - first offender- - cases involving the alcotest be tried based on clinical evidence when available including but not limited to objective - - of sufficient evidence as well as the alco test- - test results. That is- - Chun that based upon clinical evidence there are people who might not give the required volume. So for them to say that - - or for them to make this statement , and I do not say this in my brief, it is not really who- - who are first offenders. That is Chun contemplated people other than - -
THE COURT: I'm sorry? Contemplated what?
MR. AFRIYIE: Contemplated others.
THE COURT: Others.
MR. AFRIYIE: Other offenders besides women, because if Chun wanted to limit the knowledge as to only women they would have said that. They wouldn't have said offender- - first time offenders. Women are not going to be considered only the first offenders.

And besides, if you want to talk about women the age is not determined by clinical evidence. You said first offenders if you consider the clinical evidence Chun is talking about the age, 65 and over. Of course it said over. And, you don't need clinical evidence to prove age. Age is proved chronologically, when the person was born and you keep adding.

So, but my point is that if you read this carefully you will notice that it was not only with women. **Besides what my attorney wrote here, and I agree with him, the significance of the lowered breath blow rests less with evidence utilized to support a charge of drunk/driving and more with - - and more in the relationship to a**

charge of refusal. For this individual goes without saying the edge- - the most significant breath blow may not be used as proof on a charge of refusal. His is different from mine. His is on page 105, but mine is - - I don't know who that is, but mine is different. Mine is different previous. His is page 0 something, and mine is page I think 57 or something like that. Can I show you this paper?
THE COURT: What are you reading from there, sir?
MR. AFRIYIE: From Mr. Shusted to Jack--
THE COURT: Oh.
MR. AFRIYIE:--Jack Krell, and also to the attorney, the State attorney.
THE COURT: Okay.:
MR. AFRIYIE: and it's page 105.
THE COURT: Okay. That was not part of the record below. That was correspondence that was --
MR. AFRIYIE: Oh no.
THE COURT: - - exchanged. Exchanged.
MR. AFRIYIE: Quoted from <u>Chun.</u>
THE COURT: Yes. Okay
MR. AFRIYIE: Yeah. And, he say that the most sufficient breath blow will be not use of proof on a traffic refusal for those individuals
THE COURT: For those individuals?
MR. AFRIYIE: Yes. That is good- - for true critical evidence. Critical to who or they would produce enough volume.
THE COURT: That's true.
MR. AFRIYIE: Yeah.

The Court - Findings

THE COURT: So, for those- - for those classifications of people they're presumed that they cannot comply. Gentlemen, I thank both. And I don't want to keep this in suspense. What I propose to do, Mr. Afriyie, is I'm going

to reserve decision on this, and I'll explain to you why, but we can cover some of the ground today. I do have some other things to do and I want to move on. I'm not in a hurry, but this matter would—require some careful consideration because of all of the issues, but, first, let me just speak about a couple of things that are inherent in municipal court appeals.

First of all, as I have said to you, Mr. Afriyie, I'm limited to what happened below so I can't consider any factual, new factual information, new reports, new documents or anything like that so that's why I did not consider your additional medical information. That might have been helpful had it been submitted to Judge Krell at the - - at the appropriate time.

So, I'm limited to the information that was given to Judge Krell. I'm limited to the documents that were submitted and marked into evidence. I'll just say as an aside that perhaps the medical reports should not have been admitted because you cannot cross-examine a report. That should have required the medical doctor to be present. Perhaps he could have cleared this up for the Court. He wasn't there. It's too late for that. The document was admitted.

Likewise, with regard to the report that was- - that indicated the volume, that was admitted without objection even though the author of that report, the trooper, was not present and did not testify, but his report went into evidence without objection.

Likewise, the trooper who was a witness, not the trooper who administered the test, but the trooper who was a witness, testified concerning observations of Mr. Afriyie. So, that's the information that I consider together, of course, with the Chun decision and any other law which I would be obliged to consider. But, first, let me just- - we can make this a lot simpler because, Mr. Afriyie, your argument that the Judge without medical

information appointed himself as a medical expert, is not a well-founded argument for the following reasons: that a fact-finder, whether it is a Judge or jury is permitted to hear an expert testify and just because the person is an expert and there was no qualification of this doctor as an expert. Had he been present his qualifications would have been where he went to medical school, what his practice consists of, things like that, and he would have been perhaps indicated as an expert. We'll never know that either, but let's assume that he is an expert or they were experts. There were more than one doctor's reports. Any Judge or jury would be permitted to accept as that which the doctor said or to reject the doctor. The simply because he's an expert and jurors and judges are not does not mean that the witness needs to be believed. So, I could have the world's greatest expert here on stand and the jury could make a determination that we don't accept what he- - his opinion.

But, in any event, any medical opinion or any other professional opinion has to meet a certain threshold standard is within a reasonable degree of medical certainty concerning things have happened in the past or within a reasonable degree of medical probability if it's concerning things that might happen in the future. The reports submitted did not reach that standard the Judge found, and he found that because the reports in essence says it could have been the reason, but inherent in that is it could have been and it could not have been. He didn't say that, the doctor didn't, but that was why Judge Krell started speaking about possibilities and probabilities.

Probability you can look up in Webster's Dictionary, but that won't help you in this context. Because in this context probability is a term of art. It has a particular meaning in the law, and it means more likely than not. So if the doctor says it could have been the reason that may - - that was not sufficient for Judge Krell because he did not say within a reasonable degree of medical certainty that,

indeed, was the reason and this is my opinion. Had he said that your arguments on that point, Mr. Afriyie, would have been much greater.

Had he been present to testify your attorney could have asked him those questions with a little more pointedness and maybe the doctor would have offered that opinion, but that is the price that everyone pays when the show up for trial without the personsbeing present and rely on their reports.

So, I'm telling you this because I'm going to reject the argument that you advance that the Judge in some way usurped the position and placed himself ahead of the doctor because that happens every day in Court in the country let alone in New Jersey. That is to say that experts offer opinions. Jurors and judges accept them, sometimes they do not accept them sometimes, but if they are not within the requisite standard, that is within a reasonable degree of medical probability that enhances the Judge's or the jury's ability to reject it. So that argument- - that argument bfails.

With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose without question some doubt into the refusal issue, but the standard that the State has to meet is is it beyond a reasonable doubt. So the fact that you may have injected some portion of doubt, some small portion doesn't mean that you prevail. Some doubt is okay. The State's obligation is to prove as you pointed out the refusal beyond a reasonable doubt.

A lot of the information you started to tell me and I only interrupted you because it did not have application to the case that is the - - how the alcotest works and the calibration, the other sampling, all of that would have application were there to have a reading by the machine. **Never got to that point because the operator properly, says the State, improperly you say, exercised discretion and said this gentleman isn't trying. He is - - and I don't want to characterize the witness as trooper, but he- -**

that is why I want to reserve. I want to read his testimony again. Not the operator, but the other trooper said some unflattering things about Mr. Afriyie and said that he wasn't trying, didn't - - didn't make a good effort, things of that sort. That information is in the record.

So to sum up in terms of where I'm going, the issue is whether or not this guilty plea should be withdrawn, and the basis of the guilty plea was whether or not there was a refusal. Any waiver of the right to - - to go forward would have to be a knowing and voluntary waiver. And , Mr. Afriyie raises the issue that his waiver of the trial was based on insufficient information, improper information, so forth. It is mind- - I'm mindful of course that he had an attorney present who- - with whom he perhaps should have conferred on that. He wasn't alone as he is today. He had counsel with him, but I'm limited to the record below and I'll consider it again carefully of course and will announce my decision on November the 7th, and the reason for that is I'm going to be away next week, Mr. Afriyie. I'm going on a vacation, and I- - but I will be back, review this.

And it' not required that you be here. But I intent to probably reduce it to writing, but if I don't reduce it to a wriying I will make a decision on November the 7th. I will continue the stay so that you won't suffer any adverse consequences as a result of this were the – were your application to be denied and I'm not saying that that's going to be the case, but regardless, I'll continue the - - the stay. I'll take another look at it carefully and in light of your arguments here today, Mr. Afriyie, and Mr. DeSimone, and will announce the decision some time on November the 7th, which is a Friday

MR. AFRIYIE: What about the Judge's interpretation of the New Jersey Statute where it says that given (sic) insufficient breath will amount to refusal?

THE COURT: Okay. This is an issue in the case. The question is obviously if you had simply refused, no, I'm not touching that , I'm not doing anything that would be a refusal. You would agree. Everybody would agree. Whether you're giving an insufficient volume is tantamount to a refusal is an issue in the case, and that point you raised, and I'll address that. I heard your point on that, that certainly everyone would agree if you simply put your hand over your mouth and refused, like that, that would be a refusal, no doubt about that. You didn't refuse in sense that you didn't extend some effort, but if you made a small effort and not enough then is that a refusal, is that not a refusal? s that the same as a refusal, that's the issue that is in question.

I'll consider it carefully. I thank you for your - - appearances today, gentleman, both of you, and your submissions. And November 7th it will either be on the record or in the mail. Do I have- - I think I saw Camden, but then I thought New Jersey, but it' Camden Delaware. All right. Let me make sure that - - yes. 212 Loan Tree, that's your address. All right. Thank you very much, gentlemen. Appreciate your- - and I will reserve. Okay. Thank you.

CERTIFICATION

I, Janet Barbieri, the assigned transcriber, do hereby certify the foregoing transcript of the videotape recorded proceedings in the Salem County Superior Court, on October 10, 2008, is prepared in full compliance with the Transcription Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

DATE: 12/22/08 SIGNED----------

JANET BARBIERI AOC #131

CARNEYS POINT TOWNHIP
MUNICIPAL COURT
COUNTY OF SALEM
STATE OF NEW JERSEY
DOCKET NO: 11-08
A.D. #_____

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
v.	)	OF
	)	HEARING
FRANCIS OSEI-AFRIYIE	)	
	)	
Defendant.		

PLACE: Carneys Point Township
Joint Municipal Court
Carneys Point, NJ 08069

Date: July 16, 2010

Before:

HONORABLE DAVID E. KRELL, P.J.M.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE
212 Lone Tree Drive
Camden, DE 19934

APPEARANCES:

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(Prosecutor for the Township of Carneys Point)
Attorney for the State of New Jersey

THOMAS J. SHUSTED, JR. ESQUIRE
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Direct Testimony of trooper Cresong

Q. You indicated in your report – I believe you prepared the report that Mr. Shusted put into evidence that you determined that the defendant was unable to give a breath sample to the trooper. You included that in your report, correct?

A. Yes

Q. What - - allowed you to make that determination? What did you base that determination upon?

A. That was based on my- - sergeant at the time gave the Alcotest. He gave two samples that didn't meet the liters required to equal a positive test. The machine automatically shuts you off.
Q. After eleven times, is that not correct?

A. Eleven times is the – as far as it will go up to. It is up to the - - to the operator of that machine to make the determination if he's given a valid sample or not.
Q. And were you there when that determination was made?

A. Yes, sir.

Q. Did you confer with the sergeant who was operating the Alcotest whether or not a valid sample was being provided?
A. I did. I concurred with Sergeant Smith that the defendant was not trying to give valid samples.

Q. And what did you base that observa- - or what did you observe that allowed you to draw that particular opinion?

A. Through- - very little needs to be given into that machine as far as to- - fill a liter up- - the - - the Alcotest up with air.

Mr. SHUSTED: Your Honor, I'm going to have to object to that. I understand that it's a 104 hearing , but I don't think that this trooper is qualified to give the Alcotest at the time of the stop, so he really can't –I don't believe that he can testify - -

THE COURT: Well, you can bring that in on cross

MR. SHUSTED: Okay.

BY MR. HOFFMAN:

Q. Are you certified to operate the Alcotest?

A. I am now, I was not at the time.

Q. And when did you receive your certification?

A. Approximately three, four months ago.

Q. Okay. After receiving your certification, would you draw any different opinion than you did on the date in question?
A. No.

Q. Now, refreshing your recollection back to the date in question, you indicated that the defendant was unable to give the breath sample?
A. Correct.
Q. Was he unable to give or was he refusing to give it?

A. According - - I can't make that determination. By the liters of the - - by how much he was trying to blow in there--that was - - that was - - that was the decision made by Sergeant Smith. I could not make that decision just by viewing him. He was- - I had a view of how much was going across. It wasn't - - they have asterisks that go across Alcotest to let you know how hard someone is blowing. He was not trying to- - they were not going across smoothly. He didn't seem like he was - - he was very antagonistic the whole time, kind of playing games. I think that's what the - - that's the determination the sergeant made at the time.

Q. And you questioned the defendant, didn't you, on this night?

A. I did, sir.

Q. And was he cooperative?

A. No, sir.

Q. Did he answer your questions?

A. With - - he answered them, but through, you know, multiple times of trying to get the answer out of them.

Q. And he refused to answer several questions on the drunk driving questionnaire that we submitted into evidence, correct?

A. Correct.

Q. And based upon his demeanor on that evening, you and the Sergeant determined that he was uncooperative in giving the breath sample.

A. Correct.

CROSS EXAMINATION BY MR. SHUSTED

Q. Trooper, how many DWI arrests have you done in your carrer?

A. Fifteen plus, twenty plus.

Q. Okay. Have you issued- - have you issued refusal tickets before this gentleman?

A. Yes.

Q. Okay. And when you issued these tickets for refusal, it's fair to say sometimes people just don't even want to get on the box, correct?

A. Correct.

...

Q. And just so we're clear, Officer, in your experience, you've observed times when defendants give a fake test or half –test, half blow, don't really try to do that through the - - on the box, correct?

A. Correct.

Q. All right. And in your report here, you don't have any notations saying that Mr. - - the defendant here was faking in regards to trying to give the sample?

A. In my report, no.

Q. All right. And it's also fair to say that your report, which we admitted into evidence as D-6, when you make the discretionary call for the refusal, your very words say he is unable to do so.

A. Correct.

Q. Okay. And is it fair to say that something did register on the Alcotest as far as a sample breath, as well as a time period that he attempted to blow?

A. Correct.

Q. All right. And when you asked him the predicate questions before he took the test, he answered yes?

A. As far as the standard statement will he take the breath test?

Q. Correct.

A. Yes.

Q. Okay. So - - and so he – and he approached the box. He didn't say, hey, I'm not going to do it. I'm ready to- - I'm - - his attitude was I'm ready to show you that I'm not intoxicated?

MR. HOFFMAN: Well if you could answer that question.

MR. SHUSTED: All right.

THE COURT: Did- - well, first of all, did he ever say that to you?

WITNESS: That he - - that he was ready to take the test?

THE COURT: What the lawyer just said?

WITNESS: No Sir.

THE COURT: Did he say to you, let's go. I'm ready to take the test- -

THE WITNESS: No, Your Honor, he did not.

THE COURT: - - to show you I'm not intoxicated?

THE WITNESS: No, he did not, Your Honor

MR. SHUSTED: All right.

Q. Just so we're clear, it's Sergeant Smith who made the decision to stop the test.

A Correct.

Q. And you've had you training now on Alcotesting, correct?

A. I do now, yes, sir.

Q. You didn't at that time?

A. Correct.

Q. And you know that subsequent having that training, that the Alcotest can receive eleven tests before it's determined that there's a refusal that's issued on the Alcohol Influence Report?

A. Correct.

Q. And the word refusal, pursuant to the machine, was never issued on this particular test?

A. Correct.

Q. The refusal ticket is only issued because Sergeant Smith, in his discretion, decided to stop the box after two tests.

A. Correct.

MR. SHUSTED: That's all I have, Judge.

....

CERTIFICATION

I, Barbara Morris, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 54, index numbers 5588 to 7207, and tape number 55, index numbers 0001 to 1273 dated July 16, 2008, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Signed---------- Date: 8/26/08
A.O.C. #499
DIANA DOMAN TRANSCRIBING

APPENDIX G

CARNEYS POINT TOWNSHIP
MUNICIPAL COURT
COUNTY OF SALEM
STATE OF NEW JERSEY
DOCKET NO:
A.D. #_____

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
v.	)	OF
	)	HEARING
FRANCIS OSEI-AFRIYIE	)	
	)	
Defendant.		

PLACE: Carneys Point Township
Joint Municipal Court
Carneys Point, NJ 08069

Date: September 11, 2010

Before:

HONORABLE DAVID E. KRELL, P.J.M.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE
212 Lone Tree Drive
Camden, DE 19934

APPEARANCES:

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Colloquy
(Court in session)

THE COURT: Allright. Francis Osei-Afriyie?
A SPEAKER: Judge, when we- - may the Prosecutor approach on that? I think we 're- -
THE COURT: Yeah, sure.

(Other Matters Head)
THE COURT: Mr. Shusted, are you ready?
MR. SHUSTED: We are, Your Honor.
THE COURT: All right. Well I do need Mr. Hathaway. I don't know where he got to.
THE CLERK: He went back in the- -
THE COURT: Well, we can proceed until he gets here. Let me have your appearance, please.
MR.SHUSTED: Good afternoon, Your Honor. Thomas Shusted, Jr., on behalf of defendant. Your Honor- -
THE COURT: And the defendant is Francis Osei-Afriyie?
MR. SHUSTED: Osei- -
DEFENDANT: Yes, please.
MR. SHUSTED: - - yes.
THE COURT: Allright. Would you raise your right hand, sir?
THE COURT: Your name and your address?
THE DEFENDANT: Francis Osei-Afriyie. And my new address is 212 Lone Tree Drive.
MR. SHUSTED : LONE- - the word- - the word three- - the word three- - the word numerical three Drive.
DEFENDANT:Yeah ,yeah. No, no.

THE COURT: All right. Mr. Shusted, we had conferences. Let me see if I understand where we are going here.

We have a 4-50 and a refusal. We have an open alcohol container. We have a careless driving and following too close. My understanding is that the defendant is pleading guilty to the refusal, that you want to put- - place on the record certain issues that you feel may be relevant depending on how the Chun decision plays out, which may give you the right to come back and ask me to vacate that guilty plea.

As I understand, you can expound on this if you feel you need to.

There is an issue with respect to the taking of the breath that the defendant attempted to take a breath sample, but he was not able to get the full volume that's needed, which I believe is 1.2 liters. And he only produced how much, according to the readings?
MR. SHUSTED: .09 for one and 1.0 for the second one.
THE COURT: Okay. And we are aware of Judge King's report which raises a question as to whether the way that the machine is programmed that requires 1.2 liters is, in fact, fair to the defendant. He- - he in his report, as I read it, suggested that there be a distinction between the general population and those- - that set of individual defendants who take the breath test with the Ascotest are female over 65 who may not be able to produce 1.2, and I believe 1.0 is the amount of that.

So what you want to be able to do is enter the plea, reserving the right to come in and use any ammunition out of the Chun decision from the Supreme Court that you can to try to vacate or make an argument that he did give an adequate breath sample?
MR. SHUSTED: That's correct, Your Honor. And –and just as your is aware, although you may have seen it, I have produced to Mr. Hathaway two reports- - or a two - page report dated June 21st which specifically goes to this particular issue where the physician talks about severe inflammatory esophagitis and other brushings (sic) which- - may prevent him from doing that.

As –as I told him- - as I told the defendant now, he realizes today that he's going to plead voluntarily because as the case law stands now, it is 1.2. That- - the penalties would be stayed and that obviously you would be would be guided, as well as the Prosecutor and myself.
THE COURT: All of us by whatever the Supreme Court does.
MR. SHUSTED: - - by whatever that decision says.
THE COURT: - - in Chun, and we don't know.

MR. SHUSTED: And- - his right - - his right is preserved not only on that decision, but based- - also on medical reports which I've previously gived.

THE COURT: Now, to take it one step further, Mr. Prosecutor, I turn to you now because it's my understanding that without a reading, the physicals and the observations are not sufficient, in your opinion, to prove a 4-50, is that correct?

MR. HATHAWAY: That's correct, Your Honor.

THE COURT: So you're moving to dismiss the 4-50 and other charges?

MR. HATHAWAY: That's right. Yes. And - - and particularly in light of defendant's- -

THE COURT: Plea to the refusal.

MR. HATHAWAY: - - problems that are shown in the doctor's reports.

THE COURT: I think that this is a fair resolution and is in line with the prohibition of plea bargaining that the Supreme Court has reconciled which would not allow the Prosecutor to dismiss the refusal and take a plea only to the 4050 because that would arguably fit into that anomaly and the statute that would only require a three-month suspension to someone who refused as opposed to someone who took the test and was over an 08 (sic) would be facing a seven-month suspension. I - - I'm assuming it's a first offense.?

MR. SHUSTED: It is , Your Honor.

THE COURT: Mr. Osei-Afriyie, how do you plead to a refusal to take a breath test on May 28th, 07?

DEFENDANT: Guilty.

THE COURT: And is the plea voluntary?

DEFENDANT: Yes, please.

THE COURT: Is anybody forcing you to plead guilty.

DEFENDANT: No, no, no

THE COURT: And you understand that this is going to be stayed in order to get a decision from the New Jersey Supreme Court on the Alcotest?
DEFENDANT: Yes.
THE COURT: And did you drive a motor vehicle on May 28th, 07 at approximately 8p.m. on the Turnpike here on Carneys Point at milepost 2.5?
DEFENDANT: Yes.
THE COURT: And you had been drinking prior to driving?
DEFENDANT: Not really. Not at that time. That all- - during the day. About 1:00.
THE COURT: Okay. But- - I- - may be my question was not very artful, but the question is do you- - were you placed under arrest by the trooper on a suspicion of driving under the influence?
DEFENDANT: Yes.
THE COURT: And did they take you to Moorestown Barracks and request that you take a breath test?
DEFENDANT: YES.
THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?
DEFENDANT: Yes.
THE COURT: And that, therefore, that amounts to a refusal.
DEFENDANT: Yes.
THE COURT: All right. But you understand that based on what happens in the Chun case that there mat be something in that opinion from the Supreme Court that would allow your lawyer to come back and argue to me that you may not have been able to give a full sample and that that should be considered by the Court?
DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. I find it's voluntary and there is a factual basis.

I'll stay the sentence pursuant to Chun. The sentence is a $306 fine, $33 costs, $100 DWI surcharge, 210 days revocation of the driving privileges, and twelve hours minimum mandatory attendance IDRC. The other charges are dismissed.

We will notify you in the future to come back and w'll tell you at time whether the sentence goes into effect. I'm told that we may have a decision from the Supreme Court toward the end of this year. I believe the testimony in the case is going to be taking place in the next few weeks. The Special Master appointed by the New Jersey Supreme Court will render a decision by, I believe, October 27th. And no one tells the Supreme Court when to render a decision. So we wait for them to tell us when they are ready to render their decision, but I have a feeling it will be pretty quickly after they get the final reports.

In any event, at this point, the sentence is stayed. You do need to sign some paperwork at the window. And if you move, you need to inform us and your lawyer so we know where to find you. Any questions, sir?
DEFENDANT: No—no, sir.
THE COURT: All right. See the Court Administrator. Thank you.
MR. SHUSTED: Thank you, Judge.
THE COURT: Thank you, Mr. Shusted.
MR. HATHAWAT: Thank you, Your Honor.
THE COURT: And thank you, Mr. Hathaway.
DEFENDANT: Thank you.
THE COURT: I - - now you can all be rested for tomorrow. Do we have- - have you looked at tomorrow's list?

(Court Adjourned)

CERTIFICATION

I, Barbara Morris, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape

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Signed---------- Date: 8/26/08
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